Recent Developments in the Law of Lawyering 2002-2003

Presented by

State Bar of California
Committee on Professional Responsibility and Conduct

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I. RECENT CASES

Aguilar v. Lerner (1st Dist. 6/26/2001) 108 Cal.Rptr.2d 546, rev. granted, 33 P.3d 447, 113 Cal.Rptr.2d 24, 2001 Daily Journal D.A.R. 11,165 (10/17/2001).
Malpractice
Arbitration
Relying on Moncharsh v. Heily & Blase (1992) 3 Cal.4th 1, 11, 27-28, 10 Cal.Rptr.2d 183, 832 P.2d 899, court held client had not waived right to appeal the arbitration award in his malpractice action by having participated in the arbitration, noting that the lawyer had not voluntarily participated in the arbitration in the first place, having been ordered to do so by the trial judge. The appellate court affirmed the judgment, however, reasoning that the client was estopped from claiming protection under the Mandatory Fee Arbitration statute, B&P Code §§ 6200 et seq., because he had "disclaimed" those rights when he filed his malpractice action against the lawyer.

Alcala v. Woodford (9th Cir. 6/27/2003) 334 F.3d 862, 3 Cal. Daily Op. Serv. 5644, 2003 Daily Journal D.A.R. 7155, 2003 WL 21479370.
Ineffective assistance of counsel
Lawyer, who made decision to present alibi defense for criminal defendant client accused of murder but failed to call alibi witness or offer documents in support of defendant's alibi, provided ineffective assistance to defendant warranting reversal of conviction.

Matter of Bailey (Del. 5/2/2003) 821 A.2d 851.
Discipline
Supervisory responsibilities
In Delaware case that may have far-reaching application, the managing partner of a firm was held to have "enhanced duties, vis-a-vis other lawyers and employees of the firm, to ensure the law firm's compliance with its recordkeeping and tax obligations under the" Del. Rules of Professional Conduct and was suspended for 6 months where court found that lawyer "knowingly failed to exercise even a modicum of diligence in supervising the maintenance of the Firm's books and records and that his indifference and inattention endured without correction until the [client protection fund's] audit."

Barnard v. Langer (2d Dist. 6/25/2003) 109 Cal.App.4th 1453, 1 Cal.Rptr.3d 175.
Malpractice
Settlement
Conflicts of Interest
Court holds: (1) there was no conflict of interest for law firm in inverse condemnation case where City had made two offers to client, client accepted lower offer that generated a lower attorney's fee, and there was no evidence firm tried to influence client to accept settlement generating higher fee; and (2) client had not shown he would have received more money for his property *but for* the firm's advice to settle rather than go to trial.

Beard v. Goodrich (Cal.App. 2003) 2 Cal.Rptr.3d 160, 2003 WL 21702357.
Attorney Fees
Settlement
Contract
Notwithstanding court's award of attorney's fees to lessee under lease agreement that awarded attorney's fees to prevailing party in a dispute between lessee and lessor, lawyer was only entitled to 40% of the settlement amount of $590,000 rather than the court's full award of $323,000 in attorney's fees.

Bird, Marella, Boxer & Wolpert v. Superior Court (2d Dist. 2/19/2003) 106 Cal.App.4th 419, 130 Cal.Rptr.2d 782.
Criminal Conviction
Breach of fiduciary duty
Breach of contract/fee agreement
Convicted former criminal client of law firm need not prove his actual innocence in order to prevail in a breach of contract and fraud action over fees.

Bittaker v. Woodford (9th Cir. 6/6/2003) 331 F.3d 715.
Ineffective Assistance
A-C Privilege
Defendant who put privileged information in evidence to support ineffective assistance claim does not lose ACP on retrial of the criminal conviction that was reversed.

Blumenthal v. Kimber Mfg., Inc. (Conn. 7/29/2003) 826 A.2d 1088.
A-C Privilege
E-mail
Crime-Fraud Exception
E-mail sent from corporation's employees to corporation's outside counsel seeking legal advice was protected by ACP even though it had no "confidentiality" disclaimer. In reaching its conclusion, the court performed a painstaking step-by-step analysis of the attorney-client privilege and addressed the claim that the corporation, which is a gun manufacturer, could insulate incriminating documents by sending them to counsel. Court also rejected Attorney General's claim that crime-fraud exception to ACP applied. Available at the following web address: http://www.jud.state.ct.us/external/supapp/Cases/AROcr/CR265/265cr109.pdf

See City of Reno v. Reno Police Protective Association (Nev. 12/26/2002) 59 P.3d 1212, *infra*.

Brockey v. Moore (3d Dist. 2/20/2003) 107 Cal.App.4th 86, 131 Cal.Rptr.2d 746.
UPL
Unlawful Detainer Assistants Act (UDAA)
False advertising
Businesses operated by a non-lawyer under the names "Legal Aid" and "Legal Aid Services," which purported to provide only typing services in eviction cases but in fact were found to provide legal services, violated B&P Code § 6125 and the UDAA, and so were permanently enjoined from using the word "legal" or the "scales of justice" logo in advertising.

Court found that the businesses targeted lower income and unsophisticated consumers who could easily be confused into believing business was law office, especially when official Judicial Council form summons for unlawful detainers expressly provides: "If you do not know an attorney, you may call an attorney referral service or *a legal aid office* (listed in the phone book)." (Emphasis added.)

Note also that lawyer for a non-profit legal services provider impersonated a consumer in need of eviction help and called defendant to investigate allegations against it. *See* In re Gatti (Ore. 2000), 8 P.3d 966, in which Oregon lawyer was disciplined for engaging in an undercover sting on the grounds that such conduct by a lawyer involved misrepresentation in violation of the Oregon Code of Professional Responsibility. Eventually, after the Department of Justice filed suit against the State Bar of Oregon, Gatti was effectively repealed when the Supreme Court of Oregon adopted an amendment to Oregon Code of Professional Responsibility, adding new subsection (D) to Oregon DR 1-102, which allows a lawyer to engage in undercover operations.

Brown v. Legal Foundation of Washington (3/26/2003) ___ U.S. ___, 123 S.Ct. 1406, 155 L.Ed.2d 376.

Interest on lawyers trust accounts (IOLTA)

Constitutional law

United State Supreme Court holds that although state use of IOLTA interest to pay for legal services for the needy is a regulatory taking, the state need not provide "just compensation" to the clients whose funds were deposited in IOLTA accounts, because the clients have not suffered any measurable loss as the state requires deposit of funds in non-IOLTA accounts when the funds can earn *net* interest for the client.

Camarillo v. Vaage (4th Dist. 1/21/2003) 105 Cal.App.4th 552, 130 Cal.Rptr.2d 26.

Malpractice

Limiting scope of representation

Lawyer's filing of notice of intent to sue *known* defendants in medical malpractice action but not filing complaint naming potential Doe defendants, did not constitute malpractice, as it did not result in lawyer's failure to preserve client's rights against unknown defendants. The court reasoned that filing the intent to sue known defendants under Code Civ. Proc. § 364(a) preserves the statute of limitations against unknown defendants.

Canton Poultry & Deli, Inc. v. Stockwell, Harris, Widom & Woolverton (2d Dist. 6/5/2003) 109 Cal.App.4th 1219, 135 Cal.Rptr.2d 695.

Workers Compensation

A-C relationship

Under workers compensation statute, lawyer's duties to employer end after employer dismissed from suit and insurer assumes liability because employer has at that point no reasonable basis to believe that it and the lawyer are still in an attorney-client relationship. Accordingly, lawyer had no duty to advise employer it had right to be represented by independent counsel in employee's separate claim against employer.

In re Celine R. (7/7/2003) 31 Cal.4th 45, 1 Cal.Rptr.3d 432, 71 P.3d 787, 3 Cal. Daily Op. Serv. 5907, 2003 Daily Journal D.A.R. 7405 2003 WL 21518400.

Conflicts of interest

Juvenile Court

Sibling relationships & appointment of lawyers

Disapproving In re Patricia E., 174 Cal.App.3d 1, 219 Cal.Rptr. 783, the Supreme Court established that the harmless error standard is applicable in cases reviewing a court's decision not to appoint separate counsel for siblings in dependency hearings, i.e., "[a] court should set aside a judgment due to error in not appointing separate counsel for a child or relieving conflicted counsel only if it finds a reasonable probability the outcome would have been different but for the error." The court concluded that any error in this case involving two children who were being placed for adoption and their older half-sibling, was harmless. The court noted, however, that a court should not appoint separate counsel for children in dependency hearings unless there were an actual conflict amongst the children or the circumstances specific to the case raise a "reasonable likelihood" that an actual conflict amongst the children will arise.

Chambers v. Kay (11/4/2002) 29 Cal.4th 142, 56 P.3d 645, 126 Cal.Rptr.2d 536.

Cal. Rule 2-200

Cal. Rule 2-200

Fee splitting

Co-counsel and lawyer retained by client were neither "partners" nor "associates" under rule 2-200, and so co-counsel was not entitled to split contingent fee with retained lawyer. Moreover, the court stated that co-counsel could not recover under quantum meruit based upon a division of the contingency fee. The court stated there was "no legal or policy justification for finding that the fee the parties negotiated without the client's consent furnishes a proper basis for a quantum meruit award in this case." Sims v. Charness (2001) 86 Cal.App.4th 884, 103 Cal.Rptr.2d 619, disapproved. Nevertheless, subsequent to this decision, the Supreme Court ordered briefing on whether, in the absence of written client consent, a firm otherwise not entitled to share in such fees may nonetheless recover in quantum meruit. *See* Huskinson & Brown v. Wolf, *infra*.

City of Reno v. Reno Police Protective Association (Nev. 12/26/2002) 59 P.3d 1212.

Attorney-client Privilege

E-mail

In first case in the nation of its kind, court concluded that use of unencrypted e-mail did not waive ACP. Here, e-mail was sent to city attorneys by city's labor relations manager on city computers. Court noted city's policy stating employees had no expectation of privacy in e-mails sent on city equipment applied to private use of e-mail and not to business use.

See Blumenthal v. Kimber Mfg., Inc. (Conn. 7/29/2003) ___ A.2d ___, 2003 WL 21689657 (No. SC 16912), *supra.*

Clackamas Gastroenterology Associates, P.C. v. Wells, ___ U.S. ___, 123 S.Ct. 1673, 155 L.Ed.2d 615 (4/22/2003).
ADA
Professional Corporations
Issue was whether four director-shareholder physicians of medical practice were employees (in which case, the corporation would be deemed to have 15 employees, the minimum number required for the ADA to be applicable.) Case remanded for further fact findings to determine whether director-shareholders could be considered employees. The court noted that on remand, the following six factors would be relevant to issue whether shareholder/ directors are employees:

- "'Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work
- Whether and, if so, to what extent the organization supervises the individual's work
- Whether the individual reports to someone higher in the organization
- Whether and, if so, to what extent the individual is able to influence the organization
- Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts
- Whether the individual shares in the profits, losses, and liabilities of the organization.' EEOC Compliance Manual § 605:0009."

Id. at ___, 123 S.Ct. at 1680. Note that ultimate decision may affect small law firms.

Coronado Police Officers Association v. Carroll (4th Dist. 3/6/2003) 106 Cal.App.4th 1001, 131 Cal.Rptr.2d 553.
Attorney client privilege
Public records
A Public Defender-maintained database, whose function was to assist the Public Defender's office to represent indigents (a private function) was not a public record subject to discovery.

Matter of Davis (Cal.St.Bar.Ct. 8/6/2003) 2003 WL 21904732, 2003 Daily Journal D.A.R. 8942.
Conflict of Interest
Misappropriation & failure to account for client's funds
Lawyer was put on suspended for two years and placed on probation for four years for engaging in a conflict of interest in violation of Cal. Rules 3-310(B) & (C), and 3-600 with his corporate client by treating as his client an individual constituent of the corporate client whom lawyer was aware had been stripped of his authority to act on behalf of the corporate client, and for distributing to the constituent $50,000 from a settlement check made out to the corporation.

Dawson v. Toledano (4th Dist. 5/30/2003) 109 Cal.App.4th 387, 134 Cal.Rptr.2d 689.
Malpractice
Sanction
Res judicata
Attorney sanctioned for filing frivolous motion not foreclosed by res judicata from defending malpractice claim. Filing appeal subsequently judged to be frivolous does not constitute *per se* malpractice.

Do v. Superior Court (4th Dist. 6/18/2003) 109 Cal.App.4th 1210, 135 Cal.Rptr.2d 855.
Pro bono representation
Discovery sanctions
Borrower represented by pro bono lawyer is entitled to discovery sanctions for lender's discovery abuse in litigation brought by lender.

Drum v. Bleau, Fox & Associates (2d Dist. 4/9/2003) 107 Cal.App.4th 1009, 132 Cal.Rptr.2d 602.
Malicious prosecution
Anti-SLAPP statute
Anti-SLAPP (strategic lawsuit against public participation) statute does not bar lawyer from filing abuse of process against former client's new law firm, where latter had executed a levy on first lawyer's bank accounts despite a stay ordered on malpractice judgment client had obtained against first lawyer.

In re Emery (Kasdan, Simonds, McIntyre, Epstein & Martin v. World Sav. & Loan Ass'n) (9th Cir. 1/28/2002) 317 F.3d 1064.
Third party liability
Conversion
Where homeowner clients had assigned to their second mortgage lender any right to file a lawsuit arising out of damage to their home, law firm did not "convert" interest of lender in settlement proceeds from such a suit when law firm distributed proceeds to clients after deducting its fees, and clients later defaulted on the loan filed bankruptcy. The court reasoned that under the loan agreement, lender was only entitled to the amount "owe[d] to Lender," and that because clients were not in default at the time the lawyer disbursed the funds, lender then had no interest in the proceeds.

Ferguson v. Lieff, Cabraser, Heimann & Bernstein, LLP (6/9/2003) 30 Cal.4th 1037, 69 P.3d 965, 135 Cal.Rptr.2d 46.
Malpractice
Punitive Damages
Prevailing client in legal malpractice action is not entitled to punitive damages that the client can show she would have recovered in the underlying suit. The court, however, noted that the client can recover from lawyer if lawyer him or herself acted with oppression, fraud or malice in representing client.) Merenda v. Superior Court, 3 Cal.App.4th 1, 4 Cal.Rptr.2d 87 (1992), disapproved.

Fletcher v. Davis (Cal.App. 2d Dist. 2/19/2003) 130 Cal.Rptr.2d 696, 2003 Daily Journal D.A.R. 1893, rev. granted, 68 P.3d 343, 134 Cal.Rptr.2d 50 (5/14/2003).

Charging Liens

Supreme Court has ordered briefing on two issues, both of which the appellate court answered in the negative:

(1) Must an attorney's agreement with a client, authorizing a lien for payment of attorney fees to be imposed against any recovery in the litigation be in writing?

(2) Must an attorney obtain a judgment against the client establishing the existence and amount of such a lien before suing non-client third parties to enforce the lien?

In reaching its decision, the appellate court concluded that the same reasoning as applied in Hawk v. California State Bar (1988) 45 Cal.3d 589, 754 P.2d 1096, 247 Cal.Rptr. 599, applied here. In Hawk, the court held that a lawyer who had taken a promissory note from a client *secured* by a deed of trust had taken an interest adverse to the client, thus requiring compliance with former rule 5-101 [the predecessor to present rule 3-300, which requires the client's written consent to a lawyer taking an adverse interest in a client's property], because the lawyer could "summarily *extinguish* the client's interest in property." (Emphasis in original.) The problem is that the lawyer could collect on the secured note "without judicial scrutiny." The Hawk court, however, also observed that an unsecured note would not cause the same problem because the lawyer would have to first file a law suit to collect and could not summarily extinguish the client's interest. The Fletcher court concluded the situation here was similar to that of an unsecured loan, the lawyer being unable to recover on the lien without first bringing a suit, at which time the client could defend. Because of the procedures a lawyer must follow to establish and enforce a lien, rule 3-300 does not apply. As to the second issue on which the Supreme Court ordered briefing, the "independent action" a lawyer must bring to recover on the client's judgment means only that it is independent of the suit in which the judgment was awarded to client, not that there must be one suit to establish the amount and entitlement to the lien, and another to enforce it.

In re Grand Jury Subpoenas Dated March 24, 2003 (S.D.N.Y. 6/2/2003) 265 F.Supp.2d 321, 2003 WL 21262645.

Attorney-client privilege

Third parties

Communications between lawyers & public relations firm hired by lawyers to assist with media in law suit were protected by ACP where communications concerned the client's legal problems.

Hall v. Superior Court (2d Dist. 5/2/2003) 108 Cal.App.4th 706, 133 Cal.Rptr.2d 806.

Malpractice/breach of fiduciary duty

Third party liability

Lawyer for wife in her wrongful death action against wife's mother (for death of son on mother's property) did not owe duty to wife's husband to apprize him of his options in wrongful death action. In this case, the husband who did not live with the wife was never present when the lawyer met with the wife, nor did husband contact lawyer about the claims, and husband was present when child died on his mother's property. Citing to Meighan v. Shore (1995) 34 Cal.App.4th 1025, 40 Cal.Rptr.2d 744, and recognizing the potential conflicts that existed between wife and husband, the court noted that "it would have imposed an undue burden on" the lawyer to require him to contact the husband.

Haynes v. Farmers Insurance Exchange (4th Dist. 1/24/2002) 115 Cal.Rptr.2d 747, rev. granted (5/1/2002).
Scope of authority
Settlement
Relying on Blanton v. Womancare, Inc. (1985) 38 Cal.3d 396, 404-405, 212 Cal.Rptr. 151, 696 P.2d 645, which held "that merely on the basis of his employment [a lawyer] has no implied or ostensible authority to bind his client to a compromise settlement of pending litigation," lawyer lacked authority to settle case where there was no evidence the client even knew of, much less consented to the settlement lawyer had arranged with opposing counsel.

Hernandez v. Paicius (4th Dist. 6/3/2003) 109 Cal.App.4th 452 134 Cal.Rptr.2d 756.
Conflicts of Interest
Conflicts checks
Lawyer's conflict of interest in sharply questioning opposing party's expert witness, who was client of lawyer's firm, warranted a mistrial in medical malpractice action.

Hetos Investments, Ltd. v. Kurtin (4th Dist. 6/30/2003) 110 Cal.App.4th 36, 1 Cal.Rptr.3d 472.
Cal. Rule 3-210 (advising client re violation of law)
Disqualification
Court refused to disqualify law firm where firm had drafted promissory note on behalf of client borrower, then later sued lender alleging note violated usury laws. In reaching its decision, the court noted that firm had not violated rule 3-210, which prohibits lawyers from advising clients to violate the law unless the lawyer has a good faith belief that the law is invalid, as the firm had not represented the lender in the matter and so did not advise the lender to violate usury laws.

Hu v. Fang (2d Dist. 12/5/2002) 104 Cal.App.4th 61, 127 Cal.Rptr.2d 756.
Lawyer responsibility for employees
Court holds that lawyer is responsible for paralegal's scheduling error, thus allowing court to grant relief from default judgment entered as a result of error. In reaching its decision, the court cited to Model Rule 5.3, which demarcates a lawyer's responsibilities with respect to non-lawyer assistants.

Huskinson & Brown v. Wolf (2d Dist. 5/2/2002) 119 Cal.Rptr.2d 479, 2 Cal. Daily Op. Serv. 3859, 2002 Daily Journal D.A.R. 4829, rev. granted, 51 P.3d 296, 123 Cal.Rptr.2d 431, 2002 Daily Journal D.A.R. 8328 (7/24/2002).
Cal. Rule 2-200
Fee splitting
Following its decision in Chambers v. Kay, *supra*, the Supreme Court on 1/22/2003 ordered briefing, which had been deferred pending the decision in Chambers, on the following issue:

> "Whether, in the absence of written client consent to an agreement between law firms to divide attorney fees (see Rules Prof. Conduct, rule 2-200), a law firm that is not otherwise entitled to share in such fees may nonetheless recover from the other law firm in quantum meruit for the reasonable value of services it rendered on behalf of the client."

Iosello v. Lexington Law Firm (N.D.Ill. 7/21/2003) 2003 WL 21696991.
Internet
Web page
E-mail
Jurisdiction
Federal court in Illinois has personal jurisdiction over Utah law firm whose web page allowed visitors to complete forms and e-mail firm even though firm had no employees or other presence in Illinois.

Jalali v. Root (4th Dist. 6/9/2003) 109 Cal.App.4th 624, 135 Cal.Rptr.2d 168, as modif. on rehrg., 109 Cal.App.4th 1768, 1 Cal.Rptr.3d 689 (7/8/2003).
Malpractice
Settlement Advice, Taxes
Plaintiff client failed to show injury where lawyer advised her she would have to pay tax only on the actual amount she received in settlement after deduction of contingent fee, but where she had to pay tax on the full $2.75 million recovery.

People v. Jernigan (6th Dist. 7/3/2003) 1 Cal.Rptr.3d 511, 3 Cal. Daily Op. Serv. 5934, 2003 Daily Journal D.A.R. 7445.
Conflicts of Interest
Criminal law
Client competency
Confidentiality
Criminal defendant's due process rights to be present at the hearing where he was adjudged incompetent were not violated where defendant, whom court determined was prima facie incompetent, disagreed with lawyer's approach to the competency hearing court had ordered and had refused to cooperate.

But compare **State v. Meeks (Wis. 7/11/2003) 666 N.W.2d 859, 2003 WL 21585159**, in which the Wisconsin Supreme Court held that a criminal defendant's former attorney's testimony at the defendant's competency hearing violated the defendant's attorney-client privilege because the attorney's opinions and impressions about the former client's competency were inextricably derived from confidential information defendant had provided the lawyer, and warranted reversal of defendant's conviction. Case available at following web address: http://www.wisbar.org/res/sup/2003/01-0263.htm

Jessen v. Hartford Casualty Ins. Co. (5th Dist. 8/25/2003) 2003 WL 22004885.
Conflicts of Interest
Successive Representation
Substantial relationship test
"Play book" Disqualification

In action for breach of implied covenant of good faith & fair dealing, Insurer was not collaterally estopped by two previous federal court decision finding that insured's counsel should not be disqualified because of his previous association with Insurer's law firm. Insured's counsel, Wilkins, previously had been associated with Insurer's law firm and had personally represented

Insurer in 17 separate matters, most as coverage counsel, but in at least six matters had represented Insurer in bad faith and/or declaratory judgment actions. Rejecting the trial court's reliance on collateral estoppel, the court stressed that on remand the trial court must apply the "substantial relationship test," which it stated turned on: "(1) the relationship between the legal problem involved in the former representation and the legal problem involved in the current representation, and (2) the relationship between the attorney and the former client with respect to the legal problem involved in the former representation." The court further noted that where the latter factor showed the relationship between lawyer and former client to have been "direct," i.e., "the lawyer was personally involved in providing legal advice and services to the former client," then the lawyer's acquisition of confidential information material to the present suit will be presumed. Where the relationship was not "direct," then court must inquire whether the lawyer may have been in a position to have acquired confidential information.

Koo v. Rubio's Restaurant (4th Dist. 6/11/2003) 109 Cal.App.4th 719, 135 Cal.Rptr.2d 415.
Conflicts of Interest
Cal. Rule 2-100
Class actions
Lawyer for corporation's declaration that his firm represented both corporation and corporation's managers in class action dispute re payment of overtime to restaurant managers, did not establish attorney-client relationship with potential π-class managers requiring firm's disqualification. Court reasoned that lawyer did represent managers in their managerial but not their individual capacity, and could assert Cal. Rule 2-100, which prohibits lawyers who represent a party from contacting opposing parties, to defeat a discovery motion. The lawyer's assertion during discovery thus did not estop the lawyer from later denying an attorney-client relationship with π-class managers that would have warranted disqualification.

Matter of Kreitenberg (Cal.St.Bar.Ct. 11/22/2002) 4 Cal. State Bar Ct. Rptr. 469.
Discipline
Fee splitting with non-lawyer
Runners & cappers
Lawyer with personal injury practice disbarred for paying fees to cappers and splitting legal fees with non-lawyer office manager.

Leasequip, Inc. v. Dapper (2d Dist. 10/31/2002) 103 Cal.App.4th 394, 126 Cal.Rptr.2d 782.
Malpractice
Statute of limitations – Tolling
Lawyer could not invoke statute of limitations against client's malpractice action where lawyer told client corporation in 1994 it need not file annual statement of information and corporation was not suspended until 1998.

Mansell v. Otto (2d Dist. 4/29/2003) 108 Cal.App.4th 265, 133 Cal.Rptr.2d 276 (as modif., 5/29/2003).
Confidential records
Right of privacy
Although holding litigation privilege did not apply, court rejected plaintiff's constitutional right of privacy suit against defense lawyers who, in criminal action in which plaintiff was victim, obtained court order mistakenly releasing both plaintiff's medical and psychiatric records, and then reading and circulating psychiatric records amongst all defense counsel. Court noted that hospital released records to judge in criminal case, who released them to prosecutor, who in turn released them to defense.

McClure v. Thompson (9th Cir. 4/2/2003) 323 F.3d 1233, Petition for Certiorari Filed (Jul 24, 2003)(NO. 03-5567).
Confidentiality
Model Rule 1.6(b)(2)
Oregon case in which a majority of the Ninth Circuit panel over a sharp dissent held that criminal defense lawyer had not provided ineffective assistance of counsel by disclosing to the authorities where they might locate two children his client was alleged to have kidnaped and may have killed. Court noted that lawyer had neither violated duty of confidentiality nor created a conflict with the client.

Miller v. Ellis (3d Dist. 10/31/2002) 103 Cal.App.4th 373, 126 Cal.Rptr.2d 667.
Indemnity
Co-counsel
In indemnity action against his similarly negligent co-counsel, lawyer was entitled to recover only half of the $5,000 deductible on his malpractice insurance policy, and not half of the insurance company's payout in settlement ($75K).

Miranda v. Clark County, Nevada (9th Cir. 2/2/2003) 319 F.3d 465 (*en banc*), cert. filed, 71 U.S.L.W. 3724 (5/3/2003).
Civil rights violation
Ineffective assistance of counsel
After court held Public Defender provided ineffective assistance of counsel and former defendant brought civil rights action under 42 U.S.C. § 1983, court holds that Public Defender office's administrative policy of basing resource allocation decisions on basis of clients' polygraph test results constituted "deliberate indifference" to defendant's Sixth Amendment rights.

Mix v. Tumanjan Development Corp. (2d Dist. 2/21/2002) 102 Cal.App.4th 1318, 126 Cal.Rptr.2d 267.
Attorney Fees
Pro Se Lawyer
Attorney-tenant who was appearing pro se can recover attorney fees, as provided for in lease, for lawyer colleague who assisted him in prevailing on appeal of landlord's grant of new trial motion.

Moore v. Anderson Zeigler Disharoon Gallagher & Gray (1st Dist. 6/20/2003) 109 Cal.App.4th 1287, 135 Cal.Rptr.2d 888.
Malpractice
Third party liability
Relying on the duty of undivided loyalty a lawyer owes every client citing Flatt v. Superior Court (1994) 9 Cal.4th 275, 289, 36 Cal.Rptr.2d 537, 885 P.2d 950), court holds lawyer owed no duty to children beneficiaries of client's will to determine the testamentary capacity of client testator.

In re Nieves (C.D.Cal. Bkrtcy. 2/25/2003) 290 B.R. 370.
UPL
Bankruptcy
Non-lawyer bankruptcy petition preparer fined and ordered to disgorge fees for giving debtors unauthorized legal advice where he compiled bankruptcy documents from financial information solicited from debtors, advised debtors concerning the timing of their bankruptcy, and explained to debtors the difference between bankruptcy under Chapter 7 and Chapter 13.

Nobel Floral, Inc. v. Pasero (4th Dist. 2/26/2003) 106 Cal.App.4th 654, 130 Cal.Rptr.2d 881.
Malpractice
Jurisdiction
Mexican lawyer who filed lawsuit in California to recover attorney fees from his California client in the underlying Mexican suit is deemed to have consented to jurisdiction of the California court in a malpractice action filed in California by the client concerning the same underlying Mexican suit.

Olmstead v. Arthur J. Gallagher & Co. (1st Dist. 12/20/2002) 128 Cal.Rptr.2d 573, 2 Cal. Daily Op. Serv. 12,290, 2002 Daily Journal D.A.R. 14,405, rev. granted, 65 P.3d 1293, 132 Cal.Rptr.2d 536, 2003 Daily Journal D.A.R. 4095 (Cal. 4/16/2003).
Discovery
Sanctions
Cal. Civ. Proc. Code § 128.7, which is modeled on Fed. R. Civ. P. 11 and was enacted in 1994, does not preclude a party recovering discovery sanctions in actions filed after 1994 under Cal. Civ. Proc. Code § 128.5(a), which authorizes trial courts to award attorney fees incurred from "bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." Language in 128.5(b)(1) had suggested that 128.5(a) applied only to actions filed after 12/31/94.

Olson v. Cohen (2d Dist. 3/11/2003) 106 Cal.App.4th 1209, 131 Cal.Rptr.2d 620.
Attorney fees
Disgorgement
Registration of firm
Law firm of a California lawyer that had not registered with the California Bar as required under the B&P Code did not have to disgorge fees it had earned before its registration.

Orrick Herrington & Sutcliffe, LLP v. Superior Court (1st Dist. 4/11/2003) 107 Cal.App.4th 1052, 132 Cal.Rptr.2d 658.
Malpractice
Proof of case
In case decided before the Supreme Court's decision in Viner v. Sweet (6/23/2003) 30 Cal.4th 1232, 70 P.3d 1046, 135 Cal.Rptr.2d 629, *discussed infra*, court held that bad advice concerning settlement of litigation was "litigation malpractice," not "transactional malpractice," and thus client must use "case-within-case" analysis to prove damages. Court also noted that paying new lawyer to undo damages did not transform the case into transactional malpractice. The import of this case is lessened by Viner v. Sweet, which held that a plaintiff in a transactional malpractice action must also use "case-within-case" analysis to prove case.

Palmer v. Pioneer Inn Associates, Ltd. (9th Cir. 7/22/2003) 338 F.3d 981, 2003 WL 21692983 [Nevada].
Model Rule 4.2
Contact with represented party
Court applies Nevada test for determining when a corporation's employee has authority to bind the corporation by his or her acts or omissions and thus may not be contacted by opposing counsel pursuant to Nevada's equivalent of Model Rule 4.2 (Nevada Supreme Court Rule 182.) In Palmer v. Pioneer Inn Associates, Ltd. (Nev. 12/27/2002) 59 P.3d 1237, Nevada S.Ct. stated the test as "[E]mployees should be considered 'parties' for the purposes of the disciplinary rule if, under applicable [state] law, they have managing authority sufficient to give them the right to speak for, and bind, the corporation."

Panther v. Park (4th Dist. 8/12/2002) 123 Cal.Rptr.2d 599, rev.granted, 56 P.3d 1028, 126 Cal.Rptr.2d 726 (Cal. Oct 23, 2002), appeal dismissed & review transferred to Court of Appeal, 63 P.3d 215, 130 Cal.Rptr.2d 656 (Cal. Jan 15, 2003).
Conflicts of interest
Ethical screen
Private lawyers
Appeal dismissed and case transferred back to Court of Appeal after law firm withdraws as plaintiff's counsel of record. In Court of Appeal decision superseded by S.Ct.'s grant of review, court had held that an ethical screen of contract lawyer at plaintiff's firm would effectively rebut presumption of shared confidences where, in a substantially related action, screened lawyer had represented co-defendant of current defendants. Appeal was dismissed and case transferred back to Court of Appeal after plaintiff's firm withdrew from the representation.

Parks v. Eastwood Insurance Services, Inc. (C.D.Cal. 12/3/2002) 235 F.Supp.2d 1082.
Cal. Rule 2-100
In a representative action for unpaid wages or overtime under the Fair Labor Standards Act, 29 U.S.C. § 216(b), court held that employer may contact prospective plaintiff employees who have not yet opted into the action. Unlike class actions, where members of the plaintiffs' class are deemed represented unless they expressly opt out, thus precluding contact by defendant's counsel under Cal. Rule 2-100, § 216(b) provides: "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party..." Thus, under § 216(b),

until an employee opts in, she is not a party and has no attorney-client relationship with plaintiffs' counsel, so defense counsel may contact her.
See Parris, *infra*.

Parris v. Superior Court (Lowe's H.I.W., Inc) (2d Dist. 5/29/2003) 109 Cal.App.4th 285, 135 Cal.Rptr.2d 90.
Class actions
Contact with potential plaintiffs
Court holds that in the absence of specific evidence of abuse, a blanket prohibition on class plaintiffs' counsel's communication with potential class members prior to judicial certification of the class would be an unconstitutional prior restraint on counsel's commercial speech rights under the California Constitution.
See Parks, *supra.*

Matter of Peavey (Cal.St.Bar.Ct. 12/13/2002) 4 Cal. State Bar Ct. Rptr. 483.
Discipline
Lawyer suspended for two years and ordered to pay restitution for violating B&P Code § 6068(o)(2) [duty to report fraud civil judgment against L] and Cal.Rule 3-300 by obtaining an unsecured loan of $25,000 from clients.

Reeves v. Hanlon (2d Dist. 2/20/2003) 130 Cal.Rptr.2d 793, 3 Cal. Daily Op. Serv. 1518, 2003 Daily Journal D.A.R. 1941, rev. granted, 69 P.3d 979, 135 Cal.Rptr.2d 63 (Cal. Jun 11, 2003) (No. S114811).
Lawyer leaving firm
Duties to other lawyers
Lawyers who left firm were held to have tortiously interfered with contractual relations with law firm's employees by their having recruited law firm's at-will employees for their new firm as part of a "campaign" against the former firm, which included destroying former firm's computer records and misusing former firm's confidential information.

Richard B. v. State (Alaska 6/13/2003) 71 P.3d 811.
Conflicts of Interest
Ethical Screen
"Private" lawyers
Law firm disqualified from representing mother against father in suit to terminate father's rights where lawyer in firm had previously represented father in criminal action as a public defender. In holding that MR 1.11, which permits ethical screening when lawyers move between government and the private sector, did not apply, court held that public defenders, unlike other lawyers who might migrate from government employment, do not represent the government, but instead represent private individuals at government expense. Thus, the movement of a public defender to a private firm is more akin to a lawyer moving between private firms.

Rojas v. Superior Court (2d Dist. 10/10/2002) 126 Cal.Rptr.2d 97, 2 Cal. Daily Op. Serv. 10,362, 2002 Daily Journal D.A.R. 11,933, rev. granted, 63 P.3d 212, 130 Cal.Rptr.2d 653, 2003 Daily Journal D.A.R. 643 (Cal. Jan 15, 2003) (NO. S111585).

Mediation

Mediation privilege

Work product immunity

In action by tenants against owners and builders of building alleging concealment of construction defects, etc., raw evidence compiled by lawyers was not protected by the mediation privilege, which is intended to protect the actual negotiations and other communications in support of the mediation, except to the extent that raw evidence (e.g., lists of potential witnesses) might suggest litigation strategy.

Matter of Scott (Cal.St.Bar.Ct. 10/25/2002) 4 Cal. State Bar Ct. Rptr. 446

B&P Code 6068(c)

Attorney placed on probation for 2 years, given 60 day actual suspension, and ordered to pass the Multistate Professional Responsibility Exam after filing fourth frivolous lawsuit "in bad faith and for a corrupt motive" alleging civil rights violation by a trial judge, where lawyer previously had failed to prove the identical allegations.

Scripps Health v. Superior Court (Reynolds) (4th Dist. 6/6/2003) 109 Cal.App.4th 529, 135 Cal.Rptr.2d 126.

Attorney-client privilege

Corporation

Confidential hospital occurrence records, which were prepared by hospital employees at the direction of hospital's lawyers for use in hospital's risk management plan, were protected by the attorney-client privilege and not discoverable in a wrongful death action, even where hospital employees use parts of the reports for quality assurance purposes.

Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone (2d Dist. 3/18/2003) 107 Cal.App.4th 54, 131 Cal.Rptr.2d 777.

Third party liability

Misrepresentations

Lawyer retained by insurance company to determine the extent of its exposure under policy may be liable to insured's judgment creditors for misrepresentations lawyer made to creditors about the policy coverage. The court noted that the lawyer's deceit undermined the administration of justice because the creditors, who are third party beneficiaries of the insurance policy by virtue of Ins. Code § 11580 which affords them a direct, non-derivative action against the insurer, settled for less than they otherwise would have.

Shooker v. Superior Court (8/28/2003) 2003 WL 22021912.
Attorney-client privilege
Waiver
Expert Witness
Plaintiff's merely designating himself as an expert witness in lawsuit against former partner did not by itself waive the attorney-client privilege attaching to communications between plaintiff and his lawyer, where plaintiff stopped his expert deposition before actually disclosing any confidential information and then removed himself as an expert from the case.

Stroock & Stroock & Lavan LLP v. Tendler (2d Dist. 9/22/2002) 125 Cal.Rptr.2d 694, 2 Cal. Daily Op. Serv. 9838, 2002 Daily Journal D.A.R. 11,017, rev. granted, 63 P.3d 214, 130 Cal.Rptr.2d 655 (1/15/2003).
Malicious prosecution
Malpractice
Law firm could bring malicious prosecution claim against lawyer for a corporation that had filed a malpractice action against law firm, where there was lack of probable cause for malpractice claim (i.e., appellate court in related case had held firm did not represent corporation and trial court's disqualification of law firm in related case without giving a reason for the disqualification had not provided probable cause for the malpractice claim), but there was malice (lawyer's knowledge that law firm had not represented corporation was prima facie evidence of malice).

United States v. Bergonzi (N.D. Cal. 8/5/2003) 216 F.R.D. 487.
Attorney-client Privilege
Corporation
Criminal Law
Internal investigative report and related materials that corporate employer had prepared are not protected by the attorney-client privilege and must be produced to former executive employees of corporation who were defendants in criminal action for securities fraud. Further, work product immunity for documents had been waived by corporation providing them to government pursuant to an agreement with government.

United States v. Stepney (N.D.Cal. 2/11/2003) 246 F.Supp.2d 1069.
Attorney-client privilege
Criminal Law
Joint defense
Under its inherent powers, federal district court may order defense counsel to submit to the court for review a joint defense agreement. In reviewing agreement, court in this case concluded that joint defense agreement could not create a duty of loyalty to all defendants.

Matter of Valinoti (Cal.St.Bar.Ct. 12/31/2002) 4 Cal. State Bar Ct. Rptr. 498.
Unbundling
UPL (assisting)
Lawyer suspended for three years for providing incompetent representation to clients as an "appearance attorney" at Immigration hearings and for assisting owners of immigration law mill in the unauthorized practice of law.

Viner v. Sweet (6/23/2003) 30 Cal.4th 1232, 70 P.3d 1046, 135 Cal.Rptr.2d 629.
Malpractice
Transactional practice
Proof of case
In a unanimous opinion, the California Supreme Court held that the "case-within-case" approach required to prove litigation malpractice also applies to allegation of transactional malpractice, disapproving California State Auto. Assn. Inter-Ins. Bureau v. Parichan, Renberg, Crossman & Harvey, 84 Cal.App.4th 702, 101 Cal.Rptr.2d 72. To prevail, a plaintiff alleging transactional malpractice will have to show that but for the alleged malpractice, it is more likely than not that plaintiff would have received a better result. The trial court had instructed the jury that the alleged malpractice need only be a "substantial factor" in causing the harm.

Visa U.S.A., Inc. v. First Data Corp. (N.D.Cal. 1/29/2003) 241 F.Supp.2d 1100.
Conflicts of Interest
Pre-conflict waiver
Court holds pre-conflict waiver was effective in preventing disqualification of law firm from representing first client against second client after actual conflict arose, where firm disclosed to second client that there was a potential conflict between it and first client, second client was sophisticated & knowledgeable user of legal services, and firm had instituted ethical screen between lawyers who were working for second client and lawyers who would work in disputed action.

In re Wheatfield Business Park LLC (C.D.Cal. Bkrtcy. 11/22/2002) 286 B.R. 412.
Conflicts of Interest
Bankruptcy
Lawyer may rebut presumption that single law firm cannot represent related debtor entities that have filed under Chapter 11, but debtors must give notice to all creditors if they have potential claims against one another.

In re Wright (C.D.Cal. Bkrtcy. 3/11/2003) 290 B.R. 145.
Fees
Contract lawyer
Unbundling
Law firm barred from recovering fees for contract (i.e., "appearance") lawyer with whom it associated where firm did not disclose its use of contract lawyer or obtain client's consent. In reaching its conclusion, the court considered a number of ethics opinions, including Cal. State Bar Ethics Opn. 1994-138 (contract lawyers); Cal. State Bar Ethics Opn. 1996-147 (double-billing); and ABA Formal Ethics Opns. 00-420 (contract lawyers); 88-356 (same); and 93-379 (on fees generally & double-billing). Finally, opinion notes this is important issue because of widespread use of appearance attorneys in bankruptcy and the fact that few firms submit requests for supplemental billings for them (suggesting that perhaps firms may have misrepresented their billings in the past.)

Zamos v. Stroud (2d Dist. 7/1/2003) 1 Cal.Rptr.3d 484, 3 Cal. Daily Op. Serv. 5831, 2003 Daily Journal D.A.R. 7327.

Malicious prosecution

Anti-S.L.A.P.P. statute

Lawyer may be held liable for malicious prosecution for maintaining an action after it becomes apparent there is no basis for the action – even if lawyer had a good basis for believing it had merit when he filed the action.

II. RECENT ETHICS OPINIONS

CALIFORNIA ETHICS OPINIONS

1. California State Bar Ethics Opn. 2003-161 – Attorney-client relationship, Confidentiality

THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2003-161

ISSUE: Under what circumstances may a communication in a non-office setting by a person seeking legal services or advice from an attorney be entitled to protection as confidential client information when the attorney accepts no engagement, expresses no agreement as to confidentiality, and assumes no responsibility over any matter?

DIGEST: A person's communication made to an attorney in a non-office setting may result in the attorney's obligation to preserve the confidentiality of the communication (1) if an attorney-client relationship is created by the contact or (2) even if no attorney-client relationship is formed, the attorney's words or actions induce in the speaker a reasonable belief that the speaker is consulting the attorney, in confidence, in his professional capacity to retain the attorney or to obtain legal services or advice.

An attorney-client relationship, together with all the attendant duties a lawyer owes a client, including the duty of confidentiality, may be created by contract, either express or implied. In the case of an implied contract, the key inquiry is whether the speaker's belief that such a relationship was formed has been reasonably induced by the representations or conduct of the attorney. Factors to be considered in making a determination that such a relationship was formed include: whether the attorney volunteered his services to the speaker; whether the attorney agreed to investigate a matter and provide legal advice to the speaker about the matter's possible merits; whether the attorney previously represented the speaker; whether the speaker sought legal advice and the attorney provided that advice; whether the setting is confidential; and whether the speaker paid fees or other consideration to the attorney.

Even if no attorney-client relationship is created, an attorney is obligated to treat a communication as confidential if the speaker was seeking representation or legal advice and the totality of the circumstances, particularly the representations and conduct of the attorney, reasonably induces in the speaker the belief that the attorney is willing to be consulted by the speaker for the purpose of retaining the attorney or securing legal services or advice in his professional capacity, and the speaker has provided confidential information to the attorney in confidence.

Whether the attorney's representations or conduct evidence a willingness to participate in a consultation is examined from the viewpoint of the reasonable expectations of the speaker. The factual circumstances relevant to the existence of a consultation include: whether the parties meet by pre-arrangement or by chance; the prior relationship, if any, of the parties; whether the communications between the parties took place in a public or private place; the presence or absence of third parties; the duration of the communication; and, most important, the demeanor of the parties, particularly any conduct of the attorney encouraging or discouraging the communication and conduct of either party suggesting an understanding that the communication is or is not confidential.

The obligation of confidentiality that arises from such a consultation prohibits the attorney from using or disclosing the confidential or secret information imparted, except with the consent of or for the benefit of the speaker. The attorney's obligation of confidentiality may also bar the attorney from accepting or continuing another representation without the speaker's consent. Unless the circumstances support a finding of a mutual willingness to such a consultation; however, no protection attaches to the communication and the attorney may reveal and use the information without restriction.

AUTHORITIES INTERPRETED: Rule 3-310(E) of the Rules of Professional Conduct of the State Bar of California.

Business and Professions Code section 6068, subdivision (e).

Evidence Code sections 951, 952, and 954.

STATEMENT OF FACTS

Individuals with legal questions sometimes approach lawyers on a casual basis, in non-office settings, and in unexpected ways. We have been asked whether any of the following situations could result in the lawyer owing a duty of confidentiality to any of the individuals who approached him.

Situation 1: Jones, a complete stranger to Lawyer, approaches Lawyer in a main courthouse hallway and asks, "Are you an attorney?" As soon as Lawyer replies, "yes," Jones continues: "Doe and I have been charged with two burglaries, but I did the first one alone. What should I do?" In response, Lawyer declines to represent Jones and suggests that Jones contact the public defender's office. Later, Doe seeks to hire Lawyer to defend him on the burglary charges to which Jones referred in his statement to Lawyer.

Situation 2: Smith approaches Lawyer at a party after learning from the host that Lawyer is an attorney. Smith has no idea of the area of law in which Lawyer practices. During a casual conversation, Smith says, "My insurer won't provide coverage to replace my office roof even though my business flooded last year during a rain storm, and even though I have paid all the premiums. Do you think there's anything I can do about it?" Lawyer politely listens to Smith make that statement but as soon as Smith finishes, Lawyer tells Smith he is not in a position to advise Smith about his insurance situation. Later, Lawyer's existing insurance company client, InsuredCo, which insures Smith's business, assigns the defense of Smith's claim to Lawyer.

Situation 3: Lawyer receives a phone call at home from his Cousin. Cousin says, "Lawyer, I know you do legal work with wills and estates. Well, after Grandma died, I borrowed her car and wrecked it. Turns out the car wasn't insured. Do you think that will be a problem when her estate gets resolved? Should I do anything?" Lawyer listened without interrupting, and then told Cousin he could not represent him. He suggested that Cousin call a referral service for a lawyer. Later the family hired Lawyer to probate Grandma's estate, including obtaining compensation for the damaged automobile.

DISCUSSION

The three situations presented in the facts exemplify the kinds of communications that members of the public commonly direct to attorneys in non-office settings. We are asked to determine whether any of these situations results in Lawyer acquiring a duty to preserve the confidentiality of the information the speakers communicated to Lawyer.

In determining whether any of the three situations could give rise to a duty of confidentiality owed by Lawyer, we engage in a two-part analysis. First, we ask whether any of the situations result in the formation of an attorney-client relationship. If an attorney-client relationship is formed, either expressly or impliedly, then Lawyer owes the respective speaker all of the duties attendant upon that relationship, including the duty of confidentiality. Second, in the absence of an attorney-client relationship being formed, we still must ask whether Lawyer may nevertheless owe a duty of confidentiality to any of the speakers because Lawyer, by words or conduct, may have manifested a willingness to engage in a preliminary consultation for the purpose of providing legal advice or services, and confidential information was communicated to Lawyer.

I. <u>If an attorney-client relationship exists, an attorney owes a duty of confidentiality to the clients.</u>

Except in those situations where a court appoints an attorney, the attorney-client relationship is created by contract, either express or implied. (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 181 [98 Cal.Rptr. 837]; *Houston General Insurance Co. v. Superior Court* (1980) 108 Cal.App.3d 958, 964 [166 Cal.Rptr. 904]; *Miller v. Metzinger* (1979) 91 Cal.App.3d 31, 39-40 [154 Cal.Rptr. 22].) The distinction between express and implied-in-fact contracts "relates only to the manifestation of assent; both types are based upon the expressed or apparent intention of the parties." *Responsible Citizens v. Superior Court (Askins)* (1993) 16 Cal.App.4th 1717, 1732 [20 Cal.Rptr.2d 756], quoting 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 11, p. 46.

In none of the situations presented in the facts did Lawyer express his assent to represent the speaker. Indeed, in each situation, Lawyer expressly declined to represent the speaker. In the absence of Lawyer's express assent, no express attorney-client relationship exists.

Notwithstanding the absence of an express agreement between the parties, their conduct, in light of the totality of the circumstances, may nevertheless establish an implied-in-fact contract creating an attorney-client relationship. (Cf. *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 611 [176 Cal.Rptr. 824]; see *Kane, Kane & Kritzer, Inc. v. Altagen* (1980) 107 Cal.App.3d 36, 40-42 [165 Cal.Rptr. 534]; *Miller v. Metzinger, supra,* 91 Cal.App.3d 31, 39-40.) (See also Civ. Code, § 1621 ("An implied contract is one, the existence and terms of which are manifested by conduct.").) Neither a retainer nor a formal agreement is required to establish an implied attorney-client relationship. (*Farnham v. State Bar* (1976) 17 Cal.3d 605, 612 [131 Cal.Rptr. 661]; *Kane, Kane & Kritzer v. Altagen, supra,* 107 Cal.App.3d 36.)

A number of factors, including the following, may be considered in determining whether an implied-in-fact attorney-client relationship exists:

- Whether the attorney volunteered his or her services to a prospective client. (*See Miller v. Metzinger, supra,* 91 Cal.App.3d 31, 39);

- Whether the attorney agreed to investigate a case and provide legal advice to a prospective client about the possible merits of the case. (*See Miller v. Metzinger, supra,* 91 Cal.App.3d 31);

- Whether the attorney previously represented the individual, particularly where the representation occurred over a lengthy period of time or in several matters, or occurred without an express agreement or otherwise in circumstances similar to those of the matter in question. (Cf. *IBM Corp. v. Levin* (3d 1978) 579 F.2d 271, 281 [law firm that had provided labor law advice to corporation for several years held to be in an ongoing attorney-client relationship with corporation for purposes of disqualification motion, even though firm provided legal services on a fee for services basis rather than under a retainer arrangement and was not representing the corporation at the time of the motion.])

- Whether the individual sought legal advice from the attorney in the matter in question and the attorney provided advice. (See *Beery v. State Bar* (1987) 43 Cal.3d 802, 811 [239 Cal.Rptr. 121]);

- Whether the individual paid fees or other consideration to the attorney in connection with the matter in question. (See *Strasbourger Pearson Tulcin Wolff Inc. v. Wiz Technology, Inc.* (1999) 69 Cal.App.4th 1399, 1403 [82 Cal.Rptr.2d 326]; *Fox v. Pollack* (1986) 181 Cal.App.3d 954, 959 [226 Cal.Rptr. 532]);

- Whether the individual consulted the attorney in confidence. (See *In re Marriage of Zimmerman* (1993) 16 Cal.App.4th 556 [20 Cal.Rptr.2d 132].

- Whether the individual reasonably believes that he or she is consulting a lawyer in a professional capacity. (See *Westinghouse Electric Corp. v. Kerr-McGee Corp.* (7th Cir. 1978) 580 F.2d 1311, 1319-1320).

The last listed factor is of particular relevance. One of the most important criteria for finding an implied-in-fact attorney-client relationship is the consulting individual's expectation – as based on the appearance of the situation to a

reasonable person in the individual's position. (*Responsible Citizens v. Superior Court, supra,* 16 Cal.App.4th 1717, 1733. See also *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 281 n. 1 [36 Cal. Rpt. 2d 537]; [discussing the factual nature of the determination whether an attorney-client relationship has been formed] and *Hecht v. Superior Court* (1987) 192 Cal.App.3d 560, 565 [237 Cal.Rptr. 528] [the determination that an attorney-client relationship exists ultimately is based on the objective evidence of the parties' conduct].) Although the subjective views of attorney and client may have some relevance, the test is ultimately an objective one. (*Sky Valley Limited Partnership v. ATX Sky Valley Ltd.* (N.D. Cal. 1993) 150 F.R.D. 648, 652.) The presence or absence of one or more of the listed factors is not necessarily determinative. The existence of an attorney-client relationship is based upon the totality of the circumstances.

Before proceeding with our analysis of the particular facts presented, it is important to emphasize that not every contact with an attorney results in the formation of an attorney-client relationship. In a frequently cited case, the court found that it was not sufficient that the individuals asserting the existence of an attorney-client relationship "'thought' respondent was representing their interests because he was an attorney." *(Fox v. Pollack, supra,* 181 Cal.App.3d 954, 959.) The court noted that "they allege no evidentiary facts from which such a conclusion could reasonably be drawn. Their states of mind, *unless reasonably induced by representations or conduct of respondent,* are not sufficient to create the attorney-client relationship; they cannot establish it unilaterally." *Ibid.* [Emphasis added]. (See also *Moss v. Stockdale, Peckham & Werner* (1996) 47 Cal.App.4th 494, 504 [54 Cal.Rptr.2d 805].)

Situations 1, 2, and 3 do not appear to involve any of the foregoing factors. In none of the situations did Lawyer volunteer to provide legal services, agree to investigate, or offer any legal counsel, advice, or opinion. Nor is there any evidence that Lawyer had a prior professional relationship with any of the individuals. Moreover, none of the individuals provided any compensation or other consideration towards an engagement. Finally, Lawyer provided no comment on any of the individual's problems, other than to expressly decline to provide any assistance,[1] or to refer the individual to other resources for legal representation. Given those circumstances, none of the individuals who sought out Lawyer could have had a reasonable belief that Lawyer would either protect his or her interests or provide legal services in the future. Accordingly, we cannot conclude that an implied-in-fact attorney-client relationship was formed in any of the situations presented.[2]

II. <u>Even in the absence of an attorney-client relationship, an attorney may owe a duty of confidentiality to individuals who consult the attorney in confidence.</u>

In the first part of our analysis set out in section I, we concluded that none of the fact situations resulted in the formation of an attorney-client relationship. Thus, Lawyer does not owe any of the individuals *all* of the duties attendant upon that relationship. Nevertheless, even if an attorney-client relationship was not formed, it is still possible that Lawyer owes a duty of confidentiality to one or more of the individuals who sought him out because they have engaged in a confidential consultation with Lawyer's express or implied assent.

The second part of our analysis again focuses on the totality of circumstances surrounding each fact situation. Instead of evaluating those circumstances to determine whether the parties assented to the formation of an attorney-client relationship, however, we ask whether Lawyer evidenced, by words or conduct, a willingness to engage in a *confidential consultation* with any of the individuals. In making this determination, we first ask in section A of this part whether any of the individuals may be a "client" within the meaning of Evidence Code section 951. Second, assuming the individual is a "client," we inquire in section B whether the circumstances of the fact situation allow us to conclude that the

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[1/] An attorney can avoid the formation of an attorney-client relationship by express actions or words. (See, e.g., *Fox v. Pollack, supra,* 181 Cal.App.3d 954, 959; *People v. Gionis* (1995) 9 Cal.4th 1196 [40 Cal.Rptr.2d 456] [attorney disclaimed attorney-client relationship in advance of discussion]; and *United States v. Amer. Soc. of Composers & Publishers, etc.* (S.D.N.Y. 2001) 129 F.Supp.2d 327, 335-40 [no attorney-client relationship formed between attorney for unincorporated association and its member, in part because the association's membership agreement said so and the member therefore could not have had a reasonable expectation to the contrary].)

[2/] If an attorney-client relationship had been created, an attorney has two duties with regard to the handling of client information: the attorney-client privilege (Evid. Code, § 950, et seq.) and the duty of confidentiality (Bus. & Prof. Code, § 6068, subd. (e)).

communications between Lawyer and the individuals were confidential. (Evid. Code, §§ 952, 954.) Finally, in part III we discuss the ramifications of an affirmative answer to each of these first two questions.

A. A person is a "client" for the purposes of the attorney-client privilege and the lawyer's duty of confidentiality if a lawyer's conduct manifests a willingness, express or implied, to consult with the person in the lawyer's professional capacity.

In California State Bar Formal Opn. No. 1984-84, we concluded that a person who consults with an attorney to retain the attorney is a "client," not only for purposes of determining the applicability of the evidentiary attorney-client privilege under Evidence Code sections 950 et seq., but also for purposes of determining the existence and scope of the attorney's ethical duty of confidentiality under Business and Professions Code section 6068, subdivision (e), and under former rule 4-101 of the Rules of Professional Conduct of the State Bar of California[3], the precursor to rule 3-310(E).[4] In reaching that conclusion, our earlier opinion recognized that the duty of confidentiality and the evidentiary privilege share the same basic policy foundation: to encourage clients to disclose all possibly pertinent information to their attorneys so that the attorneys may effectively represent the clients' interests. Accordingly, we relied in part on the definition of "client" in Evidence Code section 951 in analyzing the duty of confidentiality set forth in Business and Professions Code section 6068, subdivision (e) to determine that the statutory duty of confidentiality applies to information imparted in confidence to an attorney as part of a consultation described by Evidence Code section 951, even if such a consultation occurs *before* the formation of an attorney-client relationship, and *even if* no attorney-client relationship ultimately results from the consultation.

Nothing has occurred in the interim by way of statute, decisional law, or regulation to persuade us otherwise. Indeed, the California Supreme Court recently stated: "'The fiduciary relationship existing between lawyer and client extends to preliminary consultations by a prospective client with a view to retention of the lawyer, although actual employment does not result.'" (*People ex rel. Dept. of Corporations v. Speedee Oil, Inc.* (1999) 20 Cal.4th 1135, 1147-48 [86 Cal.Rptr.2d 816] [quoting *Westinghouse Elec. Corp. v. Kerr-McGee Corp., supra,* 580 F.2d 1311, 1319, fn. omitted].)

Although the phrase "attorney-client privilege" suggests it is applicable only to those individuals who actually retain an attorney, the privilege may apply even when an attorney-client relationship has not been formed. For the purposes of the attorney client privilege, Evidence Code section 951 defines a "client" to mean: "a person who, directly or through an authorized representative, *consults* a lawyer *for the purpose of* retaining the lawyer or securing legal service or advice from him in his professional capacity . . ." (Emphasis added). Thus, to be a "client" for purposes of the privilege – and, as we discussed in California State Bar Formal Opn. No. 1984-84, the duty of confidentiality – a person need only "consult" with a lawyer with an aim to retain the lawyer or secure legal advice from the lawyer. By its terms, Evidence Code section 951 does not require that the "client" actually retain the lawyer or receive legal advice. Consequently, even if, as we have concluded, Lawyer did not establish, either expressly or impliedly, an attorney-client relationship with any of the individuals who sought him out, we still need to address whether any of those individuals may have become a "client" within the meaning of Evidence Code section 951.

[3/] Unless otherwise indicated, all rule references are to the Rules of Professional Conduct of the State Bar of California.

[4/] Rule 3-310(E) provides:

> "(E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment."

Former Rule 4-101 provided:

> "A member of the State Bar shall not accept employment adverse to a client or former client, without the informed and written consent of the client or former client, relating to a matter in reference to which he has obtained confidential information by reason of or in the course of his employment by such client or former client."

The critical factor in determining whether a person is a "client" within the meaning of Evidence Code section 951 is the conduct of the attorney. If the attorney's conduct, in light of the surrounding circumstances, implies a willingness to be consulted, then the speaker may be found to have a reasonable belief that he is consulting the attorney in the attorney's professional capacity. In *People v. Gionis, supra,* 9 Cal.4th 1196, 1211, a criminal defendant claimed his communications with an attorney with whom he had a longstanding business relationship were privileged. The defendant had made incriminating statements in those communications and argued that the attorney should not be allowed to testify. Before the defendant had made the statements, however, the attorney had informed the defendant that he would not represent him. The Supreme Court held that the statements were not protected and the attorney could testify about them. The court reasoned that the defendant could not have had a reasonable belief that he was consulting the attorney for advice in his professional capacity after the attorney had manifested his unwillingness to be consulted by expressly refusing to represent him. Id. at 1211-12.

As we elaborate in our examples below, taken together with California State Bar Formal Opn. No. 1984-84, *People v. Gionis* suggests that in the non-office settings we consider, an attorney will not owe a duty of confidentiality to the speaker if the attorney: (1) unequivocally explains to the speaker that he cannot or will not represent him, either before the speaker has an opportunity to divulge any information or as soon as reasonably possible after it has become reasonably apparent that the speaker wants to consult with him; and (2) has not, by his prior words or conduct, created a reasonable expectation that he has agreed to a consultation. In the absence of an express refusal by the attorney to represent the individual, however, it is possible for the individual to have a reasonable belief that he or she was consulting the attorney in a professional capacity, even without the attorney's express agreement. In determining whether a speaker could have such a reasonable belief, other circumstances that should be considered include whether the lawyer has a reasonable opportunity to comprehend that a person is trying to engage in a consultation, whether the lawyer has a reasonable opportunity to interpose a disclaimer before the person begins to speak, or whether the person addressing the lawyer does so in a manner that prevents the lawyer reasonably from interposing any disclaimer or disengaging from the conversation.

In applying these principles to the three situations presented in the facts, it can be seen that variations in those facts could lead to different conclusions.

For example, in Situation 1, if Jones approached Lawyer and blurted out his incriminating statement without giving Lawyer a chance to speak, there would be no basis for finding an apparent willingness of Lawyer to be consulted in his professional capacity.

On the other hand, had Jones, after Lawyer said he was an attorney, manifested a desire to consult privately by speaking in a low voice or drawing Lawyer to an unpopulated corner of the hallway, and Lawyer accompanied Jones without objection, the circumstances could support a finding that Lawyer and Jones impliedly agreed to a consultation. If, instead of merely listening, Lawyer engaged in discussion of Jones's situation, there would be a strong suggestion that Lawyer was consenting to consult in a professional capacity. (The relative privacy of the setting in which the individual communicates with the attorney is a critical factor which warrants careful examination, as we discuss in some detail in part II.B., below.)

In Situation 2, it appears that Lawyer did not have an opportunity to comprehend that Smith intended to consult with Lawyer and interpose an objection or disclaimer before Smith made any statement. It further appears that Lawyer interposed a disclaimer as soon as reasonably possible given the social setting and the time it would take Lawyer in that setting to comprehend the nature of Smith's statements. Indeed, the social setting itself weighs against finding a preliminary consultation, by contrast to the more professionally-oriented environment of the courthouse in Situation 1. In these circumstances, Smith could not have had a reasonable belief that Smith was consulting Lawyer in his professional capacity.

On the other hand, if the party's host had brought Smith to Lawyer and said, "Lawyer specializes in insurance law; he should be able to help you with your problem with that insurance company," and Lawyer politely listened to Smith's detailed recitation of the facts underlying his insurance problem before stating he could not help him, Smith could potentially have a reasonable belief that Smith consulted Lawyer in his professional capacity. While the informal social setting cuts against such a belief, the host's description of the lawyer's legal speciality and the client's problem, combined with the Lawyer's patience in listening to Smith's entire story despite the opportunity to terminate the interaction in a polite manner, could lead Smith to believe that Smith was consulting Lawyer in his professional capacity.

Given the familial relationship in Situation 3, Cousin's telephone call to Lawyer at home was not sufficient by itself to enable Lawyer to comprehend that Cousin intended to consult with Lawyer in a professional capacity. Lawyer listened to Cousin's story without interrupting, which could have created a reasonable inference that Lawyer did not object to the consultation. On the other hand, if Cousin spoke quickly without permitting Lawyer to interrupt, Cousin could not assert that Lawyer objectively manifested his consent to a confidential consultation in his professional capacity.

In all three situations, had Lawyer, before any information was disclosed or, at the earliest opportunity afforded by the speaker, demonstrated an unwillingness to be consulted or to act as counsel in the matter, there would have been no reasonable basis for contending that the lawyer was being consulted. (*People v. Gionis, supra,* 9 Cal.4th 1196, 1211.) Absent this critical element of "consultation," the individual would not be considered a "client" within the meaning of Evidence Code section 951.

B. Regardless of whether a person is a "client" within Evidence Code section 951's meaning, neither the attorney-client privilege nor the duty of confidentiality attaches to the communication unless it is confidential.

Even if the surrounding facts and circumstances give the individual a reasonable belief that a lawyer is being consulted in the lawyer's professional capacity, neither the attorney-client privilege nor the duty of confidentiality attaches unless the communication between the individual and the attorney is confidential. Evidence Code section 954 provides that a client "has a privilege to refuse to disclose, and to prevent another from disclosing, a *confidential communication* between client and lawyer . . . . " (Emphasis added.)

Evidence Code section 952 defines "confidential communication between client and lawyer" as follows:

> "As used in this article, 'confidential communication between client and lawyer' means information transmitted between a client and his or her lawyer in the course of that relationship and *in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation* or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship." (Emphasis added.)

For the privilege to attach, then, the information the speaker imparts to the lawyer during a consultation must have been transmitted in confidence by means which does not, as far as the speaker is aware, disclose the information to any third parties not present to advance the speaker's interests.

There are a number of circumstance that can affect whether a communication with an attorney is confidential. One of these circumstances is the presence of other individuals who are able to overhear the communication, but are not present to further the speaker's interests. If such a third person is present, there can be no reasonable expectation of privacy. (Cf. *Hoiles v. Superior Court* (1984) 157 Cal.App.3d 1192, 1200 [204 Cal.Rptr. 111] [Attorney-client privilege attached to communications made at meeting with corporate counsel as all persons at meeting, related by blood or marriage, were present to further the interests of the closely-held corporation].) [5]

A second circumstance that can affect the confidentiality of the communication is the reason why the person speaks to the lawyer. (See *Maier v. Noonan* (1959) 174 Cal.App.2d 260, 266 [344 P.2d 373, 377].) If the communication is intended to obtain legal representation or advice, then the person might be considered to have made a confidential communication to the lawyer. (Evid. Code, §§ 951 and 952.)

A third circumstance affecting the confidentiality of the communication is what actions the attorney took, if any, to communicate to the speaker that the conversation is not appropriate or is not confidential. Because the attorney is dealing in an arena in which he is expert and the speaker might not be, a burden is placed on the lawyer to take what opportunity

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[5/] Evidence Code section 952 specifies that "[a] communication between a client and his or her lawyer is not deemed lacking in confidentiality solely because the communication is transmitted by facsimile, cellular telephone, or other electronic means between the client and his or her lawyer."

he has to prevent an expectation of confidentiality when the lawyer does not want to assume that duty. (See *Butler v. State Bar* (1986) 42 Cal.3d 323, 329 [228 Cal.Rptr. 499]; Cal. State Bar Formal Opn. No. 1995-141.)

Fourth, confidentiality may also depend on both the degree to which the information communicated by the speaker already is known publicly, and the inherent sensitivity of the information to the speaker. Although the concept of client secrets includes information that might be known to some people, or publicly available, but the repetition of which could be harmful or embarrassing to the client, it nevertheless would be more reasonable for the speaker to expect confidentiality to the extent that the information is truly "secret" in the ordinary sense. (See Cal. State Bar Formal Opn. No. 1993-133. Compare *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179 [2000 WL 1682427, at p. 10] [attorney breached duty of confidence owed client by revealing to another client that first client was a convicted felon, where first client had disclosed the fact of his conviction to attorney in confidence, and even though first client's conviction was matter of public record].)

Applying these principles to the facts presented, variations in those facts could lead to different conclusions:

For example, in Situation 1, if Jones had approached Lawyer and blurted out his statement with others around who could easily overhear him, without making any effort to draw the attorney aside or giving other indications of a need for privacy, and without giving Lawyer a chance to speak, there could not be a reasonable basis to conclude that the communication was confidential.

On the other hand, if Jones asked Lawyer if he were an attorney, Lawyer said yes, and Jones then spoke to Lawyer in a relatively unpopulated area of the hallway, in a low voice and with the Lawyer's seeming consent, the circumstances are consistent with a confidential communication. The absence of others who were likely to overhear the communication, the modulated tone in which Jones spoke, and the seeming acquiescence of Lawyer, are all consistent with confidentiality.

In the party setting of Situation 2, considerations similar to those in Situation 1 apply. For example, if Smith had taken Lawyer aside to a quiet corner of the room, or had gone with Lawyer into an entirely separate room, then the physical surroundings would have been consistent with a private or confidential communication. However, Smith provided Lawyer with facts that do not seem to be sensitive, much of which already would have been widely known. Consequently, even had Smith spoken in an entirely confidential setting, it appears unlikely that his statements would be found to be part of a confidential communication. If there is no confidential communication, and no actual employment of the attorney, the attorney owes the person who consulted him no duty of confidentiality. (*In re Marriage of Zimmerman* (1993) 16 Cal.App.4th 556 [20 Cal.Rptr.2d 132].)

Changes in the facts, however, could lead to a different conclusion. Had Smith's communication included information known only to Smith that suggested how the insurer could successfully defend against Smith's claim, and if the conversation took place in a confidential setting, the statements could well be found to be part of a confidential communication.

Situation 3 presents the best example of a confidential setting because it occurred over the telephone, out of the hearing of anyone else, and Cousin prefaced his statement by a reference to the kind of legal work Lawyer does. However, although there is a reasonable expectation that no third party would overhear their conversation, the information imparted may not be confidential. For example, if it were already publicly known that Cousin had borrowed and wrecked the car, and Lawyer merely referred Cousin to available counsel, Cousin could not be said to have imparted confidential information. (*In re Marriage of Zimmerman, supra*, 16 Cal.App.4th 556.)

Thus, where an attorney is approached and asked if he or she is an attorney, or where the speaker indicates by his or her actions that he or she wants to speak to the attorney in confidence, for example, by taking the lawyer aside, whispering or similar conduct, the focus then shifts to the attorney to see whether the attorney affirmatively encouraged or permitted the speaker to continue talking. If so, the communication will likely be found confidential.

III. Duties owed to individuals who consult the attorney in confidence

In part II of this opinion, we have discussed how the attorney-client privilege attaches to communications between speaker and the attorney where that speaker has a reasonable expectation that he or she is consulting an attorney in his professional capacity and is imparting information to the attorney in confidence. This privilege attaches even if an

attorney-client relationship does not result. In this part, we discuss the duties owed by the attorney where the elements of a confidential communication are established.

Generally, every lawyer has a duty to refuse to disclose, and to prevent another from disclosing, a confidential communication between the attorney and client. (*Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 309 [106 Cal. Rptr.2d 906]; Evid. Code, § 954.) The attorney-client privilege is evidentiary and permits the holder of the privilege to prevent testimony, including testimony by the attorney, as to communications that are subject to the privilege. (Evid. Code, §§ 952-955.)

The attorney's ethical duty of confidentiality under Business and Professions Code section 6068, subdivision (e) is broader than the attorney-client privilege. It extends to all information gained in the professional relationship that the client has requested be kept secret or the disclosure of which would likely be harmful or embarrassing to the client. (See Cal. State Bar Formal Opns. No. 1993-133, 1986-87, 1981-58, and 1976-37; Los Angeles County Bar Association Formal Opns. Nos. 456, 436, and 386. See also *In re Jordan* (1972) 7 Cal.3d 930, 940-41 [103 Cal.Rptr. 849].)

In light of the policy goal that underlies both the attorney-client privilege and the attorney's duty of confidentiality – the full disclosure of information by clients to the attorneys who may represent them – we reaffirm our conclusion in California State Bar Formal Opn. No. 1984-84 that, with regard to information imparted in confidence, attorneys can owe the broader duties of confidentiality under Business and Professions Code section 6068, subdivision (e) and rule 3-310(E) to persons who never become their clients. (Cf. *In re Marriage of Zimmerman, supra,* 16 Cal. App. 4th 556, 564 n.2.)[6]

As we noted in California State Bar Formal Opn. No. 1984-84, there are significant consequences for the attorney under these circumstances. Not only is the attorney required to treat as privileged all such information communicated to him and resist compelled testimony, but the attorney is also required to treat as secret under Business and Professions Code section 6068, subdivision (e) any confidential information imparted to him in such circumstances. Accordingly, the attorney must also comply with rule 3-310(E), which provides: "[a] member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment."[7] For example, if the surrounding circumstances in either Situation 1 or 2 support a conclusion that either Jones or Smith had a reasonable belief that Lawyer willingly consulted with them, and they made their communications in confidence, then Lawyer would be precluded from representing Jones' co-defendant, Doe, and Smith's insurer, InsuredCo, in the matters at issue.[8]

[6/] Business and Professions Code section 6068, subdivision (e) provides that it is an attorney's duty "to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." We do not address in this opinion the full scope of duties of an attorney under section 6068(e) to one deemed to be a "client" by virtue of Evidence Code section 951. Suffice it to say that such duties include the obligation to keep confidential information conveyed to the attorney that the client expects will not be disclosed to others or used against him. However, we decline to opine that other duties, if any, may arise from Business and Professions Code section 6068, subdivision (e) to a person who consults an attorney for the purpose of retaining the attorney or securing legal services or advice, where actual employment or an attorney-client relationship does not result.

[7/] Whether a lawyer should be disqualified pursuant to rule 3-310(E) is usually determined by reference to the substantial relationship test. (See, e.g., *H.F. Ahmanson & Co. v. Salomon Bros., Inc.* (1991) 229 Cal.App.3d 1445, 1455 [280 Cal.Rptr. 614] [to determine where there is a substantial relationship between two matters, and that there is a likelihood a lawyer acquired confidential information material to the present matter, a court should focus on the similarities between the two factual situations, the legal questions posed, and the nature and extent of attorney's involvement with cases].) If there is a substantial relationship, then the lawyer could not accept the subsequent employment because the lawyer's duty of competence would require its use or disclosure. (*Galbraith v. State Bar* (1933) 218 Cal. 329, 332 [23 P.2d 291].)

[8/] We do not address the case in which a speaker, in an effort to "poison" a current or potential relationship between a lawyer and a client, communicates with the lawyer, not for the primary purpose of seeking legal advice or representation, but to interfere with his existing or potential client relationship. (See *State Compensation Insurance Fund*

CONCLUSION

The nature and scope of the relationship between a lawyer and a person who seeks advice from the lawyer will depend on the reasonable belief of that person as induced by the representations and conduct of the lawyer. Lawyers should be sensitive to the potential for misunderstandings when approached by members of the public in non-office settings.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding on the courts, the State Bar of California, its Board of Governors, any persons or tribunals charged with regulatory responsibilities or any member of the State Bar.

2. California State Bar Ethics Opn. 2003-162 – Ethical issues in public advocacy of civil obedience by attorney

THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2003-162

ISSUE: What ethical issues are raised when a California attorney publicly advocates civil disobedience, including violations of law, in furtherance of her personally-held political, moral, or religious beliefs, and simultaneously practices law?

DIGEST: While attorneys have rights under the First Amendment to express political, moral, and religious beliefs and to advocate civil disobedience, attorneys must follow their professional responsibility when acting upon their beliefs and when advising clients. At a minimum, attorneys' performance of their professional duties to clients must not be adversely affected by the attorneys' personal beliefs or exercise of First Amendment rights. In selecting areas of legal practice, types of cases and particular clients, attorneys should be cognizant of the possibility that their moral, social, and religious beliefs, and their exercise of their First Amendment rights, could adversely affect the performance of their duties to clients.

AUTHORITIES INTERPRETED: Rules 3-110, 3-210, and 3-310 of the Rules of Professional Conduct of the State Bar of California.

Business and Professions Code sections 6067, 6068, subdivisions (a) and (c), and 6103.

STATEMENT OF FACTS

An attorney (Attorney) maintains a law practice emphasizing business transactional work, estate and tax planning services, and tax controversy matters. She believes sincerely that the entire state and federal tax system is immoral, and has joined an association (Association) that opposes taxation of individuals and family businesses.

She has spoken at Association conferences and advocated resistance to the state and federal tax systems. In these speeches, she has proposed that individuals and small businesses refuse to report to the Franchise Tax Board and the Internal Revenue Service any transaction or event that might lead to the imposition of income, capital gains, or estate taxation, and has advocated that they also refuse to pay taxes.

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v. WPS, Inc. (1999) 70 Cal.App.4th 644 [82 Cal.Rptr.2d. 799] [recognizing the possibility that information will be communicated to a lawyer for the purpose of creating conflicts and disqualification].)

Attorney has never represented Association, but she receives a substantial number of client referrals from her speeches on behalf of and through her contacts in the organization. While she has publicly advocated civil disobedience, Attorney advises lawful behavior in counseling her clients.

What ethical considerations govern Attorney's activities?

DISCUSSION

I. Is it ethically permissible for Attorney to publicly advocate the refusal to pay taxes?

The facts do not identify the existence of a law prohibiting advocacy of violations of state or federal tax laws. Even if there were such a law, it might well violate the First and Fourteenth Amendments guarantees of free speech and assembly. A state may not forbid or proscribe the advocacy of a violation of law except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. (*Brandenburg v. Ohio* (1969) 395 U.S. 444 [89 S. Ct. 1827].)

Attorney's status as a lawyer does not change the analysis. To the extent speech is constitutionally protected, Attorney has the First Amendment right to advocate political and social change through the violation of law, even though the First Amendment rights of lawyers are limited in certain respects. (See *Standing Committee on Discipline v. Yagman* (9th Cir. 1995) 55 F.3d 1430 and *In re Palmisano* (7th Cir. 1995) 70 F.3d 483, cert. denied, 116 S. Ct. 1854 (1996) [both dealing with the special problem of discipline for attorneys who publicly criticize judges].)

The Committee notes, however, the distinction between advocating and engaging in violations of law. Attorneys are subject to discipline for illegal conduct even if their conduct occurs outside the practice of law and does not involve moral turpitude. As the California Supreme Court stated in the seminal case of *In re Rohan* (1978) 21 Cal.3d 195, 203 [145 Cal.Rptr. 855], explaining why discipline was appropriate for an attorney's criminal conviction of wilful failure to file tax returns: "An attorney as an officer of the court and counselor at law occupies a unique position in society. His refusal to obey the law, and the bar's failure to discipline him for such refusal, will not only demean the integrity of the profession but will encourage disrespect for and further violations of the law. This is particularly true in the case of revenue law violations by an attorney." (See also *In re Kelley* (1990) 52 Cal.3d 487 [276 Cal.Rptr. 375] [discipline imposed for two drunk driving convictions, the second while on probation from the first]; *In re Morales* (1983) 35 Cal.3d 1 [96 Cal.Rptr. 353] [discipline imposed for failure to withhold or pay taxes and unemployment contributions].)

II. Is it ethically permissible for Attorney to advise her clients not to pay taxes that are due under applicable law?

It is important to distinguish between Attorney's exercise of her First Amendment rights and her performance of her duties as a lawyer for clients. By virtue of her participation in and speech on behalf of the Association, Attorney has been retained by clients because of the political and social views she publicly has taken regarding the payment of taxes. Although a lawyer may *advocate* political and social change through the violation of tax laws, she may not *advise* a client to violate the law unless she believes reasonably and in good faith that such law is invalid and there is a good-faith argument for the modification or reversal of that law.[1]

[1/] Rule 3-210 of the California Rules of Professional Conduct prohibits a member from advising a client to violate the law "unless the member believes in good faith that such law . . . is invalid." Similarly, rule 3-200 of the Rules of Professional Conduct prohibits a member from accepting or continuing employment if he or she knows that the client's purpose is "to present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of such existing law." Further, subdivision (a) of California Business and Professions Code section 6068 requires that California attorneys support the Constitution and laws of the United States and of this state. Subdivision (c) of section 6068 requires that an attorney maintain such actions or proceedings only as they appear to him or her legal or just. Each of these rule and statutory provisions identifies a duty of an attorney; California Business and Professions Code section 6103 in turn provides that an attorney may be disciplined for violation of his or her duties as an attorney.

III. Does Attorney have an ethical duty to disclose her relationship with Association and her position on taxation to prospective and existing clients?

An attorney may not accept or continue the representation of a client, if the attorney has any of the several potential or actual conflicts of interest listed in rule 3-310 of the California Rules of Professional Conduct, absent "written disclosure" to and, in many instances, "informed written consent" from, the client or potential client. Together, the written disclosure requirements in paragraphs (B)(1) and (B)(2) of rule 3-310 apply when a lawyer has or had "a legal, business, financial, professional or personal relationship with" a party or witness in the same matter in which the lawyer represents the client.[2] Paragraph (B)(4) of the rule applies when a lawyer "has or had a legal, business, financial, or professional interest in the subject matter of the representation." As the Association is neither a party or witness in the matters of Attorney's tax clients, no disclosure pursuant to paragraphs (B)(1) or (B)(2) would be required. Similarly, as the Association is not the subject matter of the Attorney's representation of tax clients, no disclosure pursuant to paragraph (B)(4) would be required either.

We recognize that paragraph (B)(3) might appear at first glance to be applicable to Attorney. This part of the rule states that a lawyer shall not accept or continue the representation of a client without providing written "disclosure" to the client or potential client where the attorney has or had a "legal, business, financial, professional, or personal relationship with another person or entity" which the attorney "knows or reasonably should" know would be "substantially affected by resolution of the matter." However, there are no facts that implicate paragraph (B)(3). Whether Attorney "knows or reasonably should know" that the Association would be "substantially affected by the resolution of the matter" depends on the totality of the circumstances. These circumstances might include such things as the scope and object of the client's engagement of Attorney.

IV. Can Attorney competently represent clients in business and taxation matters?

Attorney has publicly advocated that others resist state and federal tax laws by refusing to report transactions and events on which taxation could be imposed, and by refusing to pay taxes. While her constitutional rights of speech and assembly may permit her such advocacy, they do not alter her duties to her clients.

These duties include the obligation to provide competent representation found in rule 3-110 of the California Rules of Professional Conduct.[3] Business and Professions Code section 6067 requires that attorneys admitted to practice in California take an oath that includes a promise "faithfully to discharge the duties of an attorney to the best of his [or her] knowledge and ability."

Attorney's personal views and public comments regarding taxation do not necessarily render her unable to competently represent a client in a tax matter. Indeed, it is possible that because of her strong beliefs Attorney has a particularly

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[2/] "Disclosure" is defined as "informing the client . . . of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client . . . ." (Rules Prof. Conduct, rule 3-310(A)(1).) Disclosure permits clients to make knowing and intelligent decisions about their representation when their attorneys have potential or actual conflicts of interest.

[3/] Rule 3-110 of the California Rules of Professional Conduct provides:

> (A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.
>
> (B) For purposes of this rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.
>
> (C) If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.

sophisticated knowledge of the substantive law and the procedures that could be pertinent to her work on tax matters. Despite this possibility, it is important to recognize that the duty of competence includes an emotional component. Rule 3-110 prohibits intentional, reckless or repeated incompetence and defines "competence" as the application of "the 1) diligence, 2) learning and skill, and 3) *mental, emotional* and physical ability reasonably necessary for the performance of legal services." (Italics added.) Thus, if Attorney's mental or emotional state prevents her from performing an objective evaluation of her client's legal position, providing unbiased advice to her client, or performing her legal representation according to her client's directions, then Attorney would violate the duty of competence. (See *Blanton v. Womancare* (1985) 38 Cal.3d 396, 407-408 [212 Cal.Rptr. 151]; *Considine v. Shadle, Hunt & Hagar* (1986) 187 Cal.App.3d 760, 765 [232 Cal.Rptr. 250]; Cal. State Bar Formal Opn. No. 1984-77; and L.A. Cty. Bar Assn. Formal Opn. No. 504 (2001).[4]

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AMERICAN BAR ASSOCIATION ETHICS OPINIONS

1. **ABA Formal Ethics Opn. 03-430 (7/9/2003). Propriety of insurance staff counsel representing the insurance company and its insureds; permissible names for an association of insurance staff counsel.**

   Summary: "[I]nsurance staff counsel ethically may undertake such representations so long as the lawyers (1) inform all insureds whom they represent that the lawyers are employees of the insurance company, and (2) exercise independent professional judgment in advising or otherwise representing the insureds. [¶.] [I]nsurance staff counsel may practice under a trade name or under the names of one or more of the practicing lawyers, provided the lawyers function as a law firm and disclose their affiliation with the insurance company to all insureds whom they represent."

2. **ABA Formal Ethics Opn. 03-429 (6/11/2003). Obligations With Respect to Mentally Impaired Lawyer in the Firm**

   Digest: "If a lawyer's mental impairment is known to partners in a law firm or a lawyer having direct supervisory authority over the impaired lawyer, steps must be taken that are designed to give reasonable assurance that such impairment will not result in breaches of the Model Rules. If the mental impairment of a lawyer has resulted in a violation of the Model Rules, an obligation may exist to report the violation to the appropriate professional authority. If the firm removes the impaired lawyer in a matter, it may have an obligation to discuss with the client the circumstances surrounding the change of responsibility. If the impaired lawyer resigns or is removed from the firm, the firm may have disclosure obligations to clients who are considering whether to continue to use the firm or shift their relationship to the departed lawyer, but must be careful to limit any statements made to ones for which there is a factual foundation. The obligation to report a violation of the Model Rules by an impaired lawyer is not eliminated by departure of the impaired lawyer."

[4/] We express no opinion as to whether or not there may be a duty to communicate to clients the possible impact of her views on taxation, or the knowledge of the taxing authorities of those views, on the outcome of the representation.

3. Headnote summaries of recent ABA Ethics opinions may be found at the following web site:

http://www.abanet.org/cpr/ethicopinions.html

III. STATUTES & OTHER LEGISLATIVE DEVELOPMENTS

CALIFORNIA

1. AB 363 – Confidentiality Exception for Government Attorneys.

Assembly Bill 363 would have created an exception to the duty of confidentiality contained in Bus. & Prof. Code § 6068(e) to allow government lawyers to disclose confidential information to prevent or rectify government misconduct. On September 30, 2002, however, Governor Davis vetoed the bill, remarking that although the legislation "is well intentioned, it chips away at the attorney-client relationship which is intended to foster candor between an attorney and client." Previously, in cooperation with the sponsor of AB 363, Assemblyman Steinberg, the State Bar had proposed an amendment to rule 3-600, which provides guidance for lawyers who represent organizations, to allow government lawyers to report confidential information outside the particular agency for which they worked to prevent government misconduct – so long as they reported *within* the government of which their agency was a part. The proposed rule, however, was rejected by the California Supreme Court, presumably because of its conflict with Bus. & Prof. Code § 6068(e).

2. AB 1101 – Confidentiality Exception to Prevent Death or Substantial Bodily Injury.

AB 1101 would create confidentiality exception to B&P § 6068(e) to allow lawyer to disclose confidential information to prevent a crime likely to result in death or substantial bodily harm. *See* Appendix for copy of AB 1101.

Note that as passed by the Senate, the President of the State Bar, in consultation with the Supreme Court, will appoint a task force to draft a rule of professional conduct to parallel the amendment to Bus. & Prof. Code §6068(e) with a goal of fleshing out "professional responsibility issues related to the implementation of this act." The Task Force will consist of civil and criminal law practitioners, including criminal defense practitioners, representatives from all three branches of the government, representatives of the State Bar's Rules Revision Commission and Committee on Professional Responsibility and Conduct, and public members.

The Task Force "should consider" the following issues:

> "(1) Whether an attorney must inform a client or a prospective client about the attorney's discretion to reveal the client's or prospective client's confidential information to the extent that the attorney reasonably believes that the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in the death of, or substantial bodily harm to, an individual.

(2) Whether an attorney must attempt to dissuade the client from committing the perceived criminal conduct prior to revealing the client's confidential information, and how those conflicts might be avoided or minimized.

(3) Whether conflict-of-interest issues between the attorney and client arise once the attorney elects to disclose the client's confidential information, and how those conflicts might be avoided or minimized.

(4) Other similar issues that are directly related to the disclosure of confidential information permitted by this act."

On August 25, 2003, the California Assembly voted 75 to 1 (two other assembly members were not present and two abstained) to concur in the Senate amendments to AB 1101, and it was accordingly enrolled and sent to Governor Davis for his signature. If Governor Davis signs it or takes no action before September 10, 2003, AB 1101 will become law. The Governor's other option is to veto the bill.

3. **AB 620 – Prohibition on Commission Sharing Between Insurance Agents & Attorneys.**

AB 620 would add new section 1724 to Insurance Code and prohibit insurance agents, brokers, and solicitors who are not attorneys from sharing commissions or other compensation with attorneys.

FEDERAL STATUTES

1. **Sarbanes-Oxley Act of 2002**

The Sarbanes-Oxley Act of 2002, signed into law on July 28, 2002, has garnered much attention in the press over the last year. The Act is Congress's attempt to address the failings in corporate governance that Enron and "Enron-like" scandals have revealed. Although most of the Act addresses changes in corporate governance and regulation of accountants, section 307 of the Act addresses lawyers' roles in corporate governance. Section 307 provides:

Sec. 307. Rules of Professional Responsibility for Attorneys.

"Not later than 180 days after the date of enactment of this Act , the Commission shall issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule--

(1) requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and

> (2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors."
>
> As contemplated in the Act, the Securities & Exchange Commission would promulgate a rule that would require lawyers who practice before the SEC to go up the ladder of responsibility within their corporate clients – as high as the board pf directors, if necessary – to report evidence of material violations of securities laws.

In addition to the up-the-ladder reporting mandated by section 307, the proposed rules the SEC published for public comment on November 21, 2002, also required a lawyer to make a "noisy withdrawal" if the board of directors did not, in the lawyer's opinion, respond appropriately to the lawyer's reporting of a material violation. (A "noisy withdrawal" involves withdrawing from the representation and notifying the SEC that the lawyer is withdrawing for "professional considerations.") The proposed rules also permitted a lawyer to reveal confidential information outside the corporate client in order to prevent, mitigate or rectify substantial financial or property injury to a third person that is likely to result, or has resulted, from the fraud of the corporate client. The proposed rules and supporting materials may be found at the following web address:

http://www.sec.gov/rules/proposed/33-8150.htm

In late January, 2003, after it had received a substantial amount of comment on its proposal (see web address: http://www.sec.gov/rules/proposed/s74502.shtml), much of it critical on the ground that it is inimical to an effective attorney-client relationship, the SEC issued final rules pursuant to section 307 that required up-the-ladder reporting and included the reporting-out provision, but did not include the "noisy withdrawal" provision. These final rules may be found at the following web address:

http://www.sec.gov/rules/final/33-8185.htm

These rules became effective on August 5, 2003.

In addition to the final rules, the SEC decided to extend the public comment period on its "noisy withdrawal" proposal for a couple of months, to enable further consideration and comment. It issued another set of proposed rules that may be found at the following web address:

http://www.sec.gov/rules/proposed/33-8186.htm

In May, 2003, the SEC indicated that it intended to issue final rules concerning this last set of proposals by the end of July, 2003.

IV. ETHICS RULES

CALIFORNIA RULES

1. State Bar of California Special Commission on the Rules of Professional Conduct

The Commission, made up of lawyer, judge and public members, is involved in a top to bottom review of the California Rules of Professional Conduct over a five-year period that commenced in fall 2001. The Commission's Charter is as follows:

"The Commission for the Revision of the Rules of Professional Conduct ("Commission") is to evaluate the existing California Rules of Professional Conduct ("California Rules") in their entirety, considering developments in the attorney professional responsibility field since the last comprehensive revision of the California Rules occurred in 1989 and 1992.

In this regard, the Commission is to consider, along with judicial and statutory developments, the Final Report and Recommendations of the American Bar Association's ("ABA") Ethics 2000 Commission and the American Law Institute's Restatement of the Law Third, The Law Governing Lawyers ("Restatement"), as well as other authorities relevant to the development of professional responsibility standards.

The Commission is specifically charged to also consider the work that has occurred at the local, state and national level with respect to Multi-Disciplinary Practice ("MDP"), Multi-Jurisdictional Practice ("MJP"), unauthorized practice of law ("UPL"), court facilitated propia persona assistance, discrete task representation and to other subjects that have a substantial impact upon the development of professional responsibility standards.

The Commission is to develop proposed amendments to the California Rules that:

1. Facilitate compliance with and enforcement of the rules by eliminating ambiguities and uncertainties in the rules;

2. Assure adequate protection to the public in light of developments that have occurred since the rules were last reviewed and amended in 1989 and 1992;

3. Promote confidence in the legal profession and the administration of justice; and

4. Eliminate and avoid unnecessary differences between California and other states, fostering the evolution of a national standard with respect to professional responsibility issues."

Meetings of the Commission, which occur about every two months, are open to the public. The Commission is posting Draft Rule Amendments to the California Bar's web site as they are completed. This is intended to allow interested parties to

monitor the Commission's work before the formal public comment period that will take place at the end of the five-year period. For more information on the Commission, please visit the home page of the State Bar at this address:

http://www.calbar.ca.gov/state/calbar/calbar_home.jsp

Click on the "Ethics" link in the right margin, then click on the Commission's link (the second link) in the left margin.

The Commission will be updating the draft rule page regularly over the next few years.

2. **Amendment to Discussion of rule 3-310 [AB 2069 Task Force].**

In State Farm Mutual Automobile Insurance Company v. Federal Insurance Company (1999) 72 Cal.App.4th 1422 [86 Cal.Rptr.2d 20], rev. denied (9/29/99) ("State Farm"), the court held that a law firm should be disqualified for bringing an action against an insurance company while representing a policyholder of that same company in an unrelated insurance defense case. The representation was found to be inconsistent with an attorney's duty of undivided loyalty. Soon after that decision, the legislature passed Bus. & Prof. Code 6068.11, requiring the State Bar to conduct a study, in consultation with representatives of the insurance defense bar, plaintiff's bar, the insurance industry and the Judicial Council, concerning the legal and professional responsibility conflict of interest issues arising from the State Farm decision.

The State Bar established a special Joint Task Force of the Judicial Council and State Bar Board of Governors ("Joint Task Force") to develop a recommendation for action. The Joint Task Force, in cooperation with COPRAC, found that the key issue raised by Business and Professions Code section 6068.11 was that the decision in State Farm may be expanded in subsequent cases to find disqualifying conflicts of interest in representation settings other than that addressed in State Farm and which would be of concern to insurance defense counsel. To limit the rationale of State Farm to its facts, the Joint Task Force recommended, and the State Bar adopted, an amendment to the Discussion section of rule 3-310, which provides that notwithstanding State Farm, subparagraph (C)(3) of rule 3-310 is not intended to apply with respect to the relationship between an insurer and a member when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to the action. In its June 2002 submission to the Supreme Court of California, the State Bar stated that the recommended clarifying language offered guidance to lawyers and the courts in applying rule 3-310.

On January 10, 2003, the Supreme Court issued its order approving the State Bar's proposal. The order included an effective date of March 3, 2003.

3. **Rule of Professional Conduct to elaborate on AB 1101's Proposed Amendments to Bus. & Prof. Code § 6068(e).**

No new California rules affecting confidentiality have been adopted in the last year. However, as discussed above under "Statutes and other Legislative Developments," AB 1101 would provide for the appointment of a Task Force to draft a rule of professional conduct that would parallel and explicate the amendments to Bus. & Prof. Code § 6068(e). The anticipated effective date for statute and rule, if the former is passed and signed into law, is July 1, 2004.

FEDERAL RULES GOVERNING LAWYER CONDUCT

1. As discussed above under the Sarbanes-Oxley Act of 2002, the SEC has promulgated rules for attorney conduct to govern attorneys who practice before the SEC.

AMERICAN BAR ASSOCIATION RULES

The ABA's Ethics 2000 Commission, which conducted a complete review of the ABA's Model Rules of Professional Conduct (currently adopted with modifications in 43 states and the District of Columbia), issued its Final Report in May 2001. Although most of its proposed amendments were adopted at either the August 2001 Annual Meeting in Chicago or the February 2002 Mid-year Meeting in Philadelphia, there were several rules related to (1) marketing and (2) multijurisdictional practice that were adopted at the August 2002 Annual Meeting in Washington, D.C., and (3) there were also proposed amendments to the rules on the agenda for the August 2003 Annual Meeting in San Francisco. *Additions are underlined; deletions are struck-through.*

1. **Rules Related to Lawyer Marketing (August 2002)**

Model Rule 7.2

The House of Delegates voted to add new subparagraph (b)(4) and Comment [8] to Model Rule 7.2, which addresses "Advertising":

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority; ~~and~~

(3) pay for a law practice in accordance with Rule 1.17; and

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if

(i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement.

* * *

[8] A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

Model Rule 7.5

The House of Delegates voted to amend comment [1] to rule 7.5, which deals with "Firm Names and Letterheads," as follows:

"A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer.

2. **Rules Related to Multijurisdictional Practice ("MJP") (August 2002)**

On August 12, 2002, the House of Delegates adopted amendments to both Model Rule 5.5 and Model Rule 8.5 intended to facilitate the implementation of MJP initiatives in the United States. *Only the black letter of the rules are included. For full versions of the rules, please obtain the ABA MJP Final Report at:*

http://www.abanet.org/cpr/mjp/final_mjp_rpt_121702.pdf

Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not~~: (a)~~ practice law in a jurisdiction ~~where doing so violates~~ in violation of the regulation of the legal profession in that jurisdiction~~;~~, or ~~(b)~~ assist ~~a person who is not a member of the bar~~ another in ~~the performance of activity that constitutes the unauthorized practice of law~~ doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires *pro hac vice* admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

Rule 8.5 Disciplinary Authority; Choice of Law

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction ~~where the lawyer is admitted~~ for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a ~~proceeding in~~ matter pending before a ~~court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding)~~ tribunal, the rules ~~to be applied shall be the rules~~ of the jurisdiction in which the ~~court~~ tribunal sits, unless the rules of the ~~court~~ tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur

~~(i) if the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction, and~~
~~(ii) if the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct~~.

3. **Rules Changes Proposed by the ABA's Task Force on Corporate Responsibility and Adopted by the House of Delegates (August 2003)**

On April 30, 2003, the ABA's Task Force on Corporate Responsibility issued its Final Report in which it proposed substantial changes to both Model Rule 1.6 (Confidentiality) and Model Rule 1.13 (Organization as Client). The proposed amendments to these rules were put before the House of Delegates at the August 2003 ABA Annual Meeting in San Francisco.

At the 2003 Meeting, the House of Delegates voted to approve the amendments to Model Rule 1.6 as they were proposed by the Task Force. See below. In addition, the House of Delegates approved the amendments to Model Rule 1.13 as proposed by the Task Force, with a modification of the standard for triggering a lawyer's duties under the rule. As proposed by the Task Force, the standard was objective ("knows facts from which a reasonable lawyer, under the circumstances), but as approved by the House of Delegates, the standard remains subjective, just as it was in the pre-Task Force version: a lawyer must have actual knowledge before the lawyer's duties under the rule are triggered. *Only the black letter of the rules are included. For full versions of the rules as adopted by the House of Delegates, please refer to the following web addresses:*

http://www.abanet.org/cpr/mrpc/new_rule1_6.pdf (Model Rule 1.6)
http://www.abanet.org/cpr/mrpc/red_rule1_6.pdf (Model Rule 1.6 – Redline Version)
http://www.abanet.org/cpr/mrpc/new_rule1_13.pdf (Model Rule 1.13)
http://www.abanet.org/cpr/mrpc/red_rule1_13.pdf (Model Rule 1.13 – Redline Version)

Model Rule 1.6. Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4~~2~~) to secure legal advice about the lawyer's compliance with these Rules;

(5~~3~~) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6~~4~~) to comply with other law or a court order.

Model Rule 1.13. Organization as Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that ~~which~~ reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. ~~In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:~~
~~(1) asking for reconsideration of the matter;~~
~~(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and~~
~~(3)~~ referring
Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, ~~seriousness of the matter, referral~~ to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if~~,~~

> (1) despite the lawyer's efforts in accordance with paragraph (b)~~,~~ the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or a refusal to act, that is clearly a violation of law ~~and is likely to result in substantial injury to the organization~~, and
>
> (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

then the lawyer may~~: resign in accordance with Rule 1.16,~~ reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

~~(d)~~ (f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) (g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

V. MULTIJURISDICTIONAL PRACTICE ("MJP")

CALIFORNIA REPORT & PROPOSED RULES

The California Supreme Court's Task Force on Multijurisdictional Practice issued its Final Report on January 7, 2002. The full report is available at the following web address:

http://www.courtinfo.ca.gov/reference/documents/finalmjprept.pdf

In spring 2003, the Judicial Council released for public comment proposed rules of court intended to allow a lawyer from another jurisdiction to practice law in California under certain conditions without either being admitted to the California Bar or being admitted pro hac vice. The proposed rules, whose public comment period expired on July 7, 2003, can be found at the following web address:

http://www.courtinfo.ca.gov/invitationstocomment/documents/sp03-04.pdf

The following are brief summaries of the proposed California Rules related to MJP.

1. ***Proposed Rule of Court 964*** would permit lawyers licensed in other jurisdictions to practice law at qualifying California"public interest" law firms (non-profits whose primary is to provide legal services without charge to the indigent) for up to three years under the supervision of a California lawyer.

2. ***Proposed Rule of Court 965*** would permit in-house counsel of corporations, partnerships, associations, and other legal entities with more than 10 employees, who are licensed in other jurisdictions, to provide legal services to the entity (but not appear in court on behalf of it) by registration with the State Bar (as opposed to having been admitted to the bar.)

3. ***Proposed Rule of Court 966*** would permit out-of-state lawyers licensed in other jurisdictions to practice law in California on a "temporary basis" if the following conditions are met:

    - The attorney is authorized to appear in a formal legal proceeding being conducted in another jurisdiction;
    - The attorney expects to be authorized to appear in a formal legal proceeding that is anticipated but not yet pending in another jurisdiction;
    - The attorney expects to be authorized to appear in a formal legal proceeding that is anticipated but not yet pending in California; or
    - The attorney is supervised by an attorney who is authorized to appear or expects to be authorized to appear in a formal legal proceeding that is anticipated or pending.

4. ***Proposed Rule of Court 967*** would permit out-of-state lawyers licensed in other jurisdictions to provide legal services in California on a "temporary basis" under the following circumstances:

    - To a client concerning a transaction or other nonlitigation matter, any substantial part of which is taking place in another jurisdiction in which the lawyer is licensed to practice;

- To California lawyers on an issue of federal law or the law of another jurisdiction; and
- To an employer-client or to the employer-client's subsidiaries or organizational affiliates.

Although the rules do not define "temporary basis," the Task Force has sought comment on opinions as to how the time allowed to practice under proposed rules 966 and 967 should be limited, e.g., to a number of days per year, or a number of consecutive days.

The overall purpose of the rules is to "permit lawyers not admitted to the State Bar of California to practice in circumstances that (1) are clearly and narrowly defined in order to protect the general public and consumers of legal services, and (2) acknowledge and provide for the realities of legal practice today."

ABA REPORT & PROPOSED RULES

In June 2002, the ABA Commission on Multijurisdictional Practice issued its final report. At the ABA's August 2002 Annual Meeting in Washington, D.C., the House of Delegates adopted each part of the Report with only minor changes. The Report is available at the following web addresses:

http://www.abanet.org/cpr/mjp/final_mjp_rpt_121702.pdf

http://www.abanet.org/cpr/mjp/final_mjp_rpt_121702.doc

It is important to note that, with exception of a few states, the recommendations have not been widely implemented. You can track the progress of MJP by going to the following web site of the ABA's Joint Committee on Lawyer Regulation:

http://www.abanet.org/cpr/jclr/jclr_home.html

You can also learn much about MJP in general and keep track of new developments by visiting the excellent web site maintained by CrossingtheBar.com:

http://www.crossingthebar.com/index.html

A concise summary of the ABA MJP Report may be found in an article by Stephen Gillers, *Lessons from the Multijurisdictional Practice Commission: The Art of Making Change*, 44 Ariz. L.Rev. 685 (2002). You can read the article at the following web address:

http://www.abanet.org/cpr/mjp/az_lawreview.pdf

The principal rule amendments the MJP Report occasioned have been set out above, under the section on ABA Rules. What follows is a brief summary of the Report's recommendations.

1. Model Rule 5.5. Although the MJP Report proposed several amendments to rules and statutes, see below, the centerpiece of its proposals are amendments to Model Rule 5.5, which traditionally has prohibited a lawyer from engaging in UPL or assisting another person to engage in UPL. The major amendments proposed for rule 5.5, and adopted by the House of Delegates, included:

    a. Title. The title was changed from "Unauthorized Practice of Law" to "Unauthorized Practice of Law; Multijurisdictional Practice of Law," in keeping with the approach that MJP is an approved practice, and not simply a carve out from UPL law.

    b. Out-of-state lawyers providing legal services in host state on a "temporary" basis. The following situations are expressly authorized MJP under MR 5.5 (c) so long as the out-of-state lawyer is not disbarred or suspended in her home state:

        (1) Out-of-state lawyer associates with host state lawyer "who actively participates in the matter";

(2) Legal services out-of-state lawyer provides are "reasonably related" to pending or potential litigation in the home state jurisdiction, and lawyer is authorized to appear (or expects to be authorized);

(3) Legal services out-of-state lawyer provides are "reasonably related" to ADR, "arise out of or are reasonably related" to the lawyer's home state practice, and pro hac vice admission is not required;

(4) Legal services out-of-state lawyer provides "arise out of or are reasonably related to the lawyer's [home state] practice." [This is intended to apply primarily to transactional lawyers]

c. Out-of-state lawyers who have a "systematic and continuous" presence in the host state and provide legal services in the host state. The following situations are expressly authorized under MR 5.5(d) so long as the out-of-state lawyer is not disbarred or suspended in her home state:

(1) In-house lawyer. Legal services of out-of-state lawyer "are provided to the lawyer's employer or its organizational affiliates" and are limited to out-of-court legal services.

(2) Catch-all. Legal services of out-of-state lawyer are authorized by federal law.

2. Disciplinary Authority. The ABA proposed amendments to Model Rule 8.5, stating host state has jurisdiction over out-of-state lawyer who provides legal services in home state. Rule 8.5 also discusses choice of law.

3. Reciprocal Discipline. Because only the lawyer's home state can impose effective discipline (disbarment, suspension, etc.), the ABA has proposed amendments to Rule 22 of the ABA Model Rules for Lawyer Disciplinary Enforcement, which would urge that the lawyer's home state respect the findings and conclusions of the host state and impose discipline on the out-of-state lawyer who has committed a violation.

4. Pro hac vice Admission. The ABA proposed a model rule of pro hac vice admission to make the diverse procedures now present throughout the country more uniform and consistent.

5. Admission By Motion. The ABA also proposed a model admission by motion rule under which lawyers in good standing who have practiced for five of the previous seven years may be admitted to the host state without having to take or pass the host state's bar examination.

a. Admission by motion is limited to lawyers who "hold a first professional degree in law (J.D. or LL.B.) from a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association at the time the graduate matriculated …."

b. California, with its large percentage of lawyers who have graduated from non-ABA accredited law schools, objected to the narrowness of this rule.

6. Foreign Lawyers. The ABA has also proposed two model rules to accommodate lawyers from foreign countries.

a. Foreign Legal Consultants. This rule would allow lawyers licensed and in good standing in a foreign country to provide legal advice to clients in the United States about the law of the lawyer's home country. Many states, including California, already have a rule that allows this.

b. Temporary Practice by Foreign Lawyers. Foreign lawyers in good standing in their home country would be allowed to provide "temporary" legal services in the United States in five situations:

(1) Foreign lawyer associates with host state lawyer "who actively participates in the matter";
(2) Foreign lawyer's services are related to litigation in a foreign country and lawyer is authorized to appear in that proceeding;
(3) Legal services foreign lawyer provides are "reasonably related" to ADR, "arise out of or are reasonably related" to the lawyer's foreign practice;
(4) Legal services foreign lawyer provides are for client who resides in or has offices in the lawyer's home country;
(5) Legal services foreign lawyer provides are governed by international or foreign law.

VI. "Limited Scope" (Discrete Task) Representation (Unbundling)

Limited scope representation (also referred to as "discrete task representation or "unbundling of legal services," are terms used to describe the concept of clients and lawyers sharing responsibility for the legal representation, as opposed to the traditional "full service" legal representation usually provided by lawyers. This approach is based on the belief that by limiting the scope of legal representation to specific services or discrete tasks, a layperson who otherwise does not have the necessary means to obtain competent legal services is able to do so.

In California, the Limited Representation Committee of the of the California Commission on Access to Justice, together with the Judicial Council of California, have been at the forefront of facilitating the realization of the benefits of limited scope representation in the California Family Court System, developing the following forms:

- FL-950 (Notice of Limited Scope Representation): http://www.courtinfo.ca.gov/forms/documents/fl950.pdf
- FL-955 (Application to be Relieved as Counsel Upon Completion of Limited Scope Representation): http://www.courtinfo.ca.gov/forms/documents/fl955.pdf
- FL-956 (Objection to Application to be Relieved as Counsel Upon Completion of Limited Scope Representation): http://www.courtinfo.ca.gov/forms/documents/fl956.pdf
- FL-958 (Order on Application to be Relieved as Counsel Upon Completion of Limited Representation): http://www.courtinfo.ca.gov/forms/documents/fl958.pdf

The forms, which became effective on July 1, 2003, are also available at the following web site and can be filled out on-line and printed:

http://www.courtinfo.ca.gov/cgi-bin/forms.cgi

Select "Family Law - Miscellaneous" from the drop down menu.

In addition, the Limited Representation Committee has prepared Draft Risk Management Materials to assist lawyers in documenting their files and ensure that the lawyers and their clients are in agreement on the scope of the lawyers' representation (i.e., which tasks the lawyer is going to perform and, perhaps more important, which tasks the lawyer is NOT going to perform), and which is currently undergoing a public comment review.

The following website is an excellent resource for updates on limited scope representation:

http://www.unbundledlaw.org/States/states.htm

APPENDIX

Assembly Bill 1101, as amended July 11, 2003.

Please note that the bill has been redacted to display only the relevant section of § 6068, sub-division (e).

BILL NUMBER: AB 1101AMENDED
BILL TEXT

AMENDED IN SENATE JULY 10, 2003
AMENDED IN ASSEMBLY APRIL 10, 2003

INTRODUCED BY Assembly Member Steinberg
(Principal coauthor: Assembly Member Pavley)
(Coauthors: Assembly Members Diaz, Koretz, Lowenthal, and Strickland)
(~~Coauthor: Senator~~ *Coauthors: Senators Ducheny and* Romero)

FEBRUARY 20, 2003

An act to amend Section 6068 of the Business and Professions Code, and to amend Section 956.5 of the Evidence Code, relating to attorneys.

LEGISLATIVE COUNSEL'S DIGEST

AB 1101, as amended, Steinberg. Attorney-client confidences.

Existing law, the State Bar Act, provides for the licensing and regulation of attorneys by the State Bar of California. Existing law imposes various duties on an attorney, including the duty to maintain the confidences and preserve the secrets of his or her client at every peril to himself or herself.

This bill would authorize an attorney to reveal confidential information to the extent that the attorney reasonably believes disclosure is necessary to prevent a criminal act likely to result in death or substantial bodily harm to an individual.

Existing law, with certain exceptions, makes privileged any confidential communication between a lawyer and a client. Existing law provides an exception to the privilege if the lawyer reasonably believes that disclosure of a confidential communication is necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm.

This bill would instead make the exception applicable if the lawyer reasonably believes disclosure is necessary to prevent any criminal act that the lawyer reasonably believes is likely to result in death or substantial bodily harm to an individual.

The provisions of the bill would become operative on July 1, 2004.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The People of the State of California Do Enact as Follows:

SECTION 1. Section 6068 of the Business and Professions Code is amended to read:

6068. It is the duty of an attorney to do all of the following:

* * *

(e) (1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.

(2) Notwithstanding paragraph (1), an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a

criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.[1]

* * *

SEC. 2. Section 956.5 of the Evidence Code is amended to read:

956.5. There is no privilege under this article if the lawyer reasonably believes that disclosure of any confidential communication relating to representation of a client is necessary to prevent ~~the client from committing~~ a criminal act that the lawyer reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.[2]

SEC. 3. (a) It is the intent of the Legislature that the President of the State Bar shall, upon consultation with the Supreme Court, appoint an advisory task force to study and make recommendations for a rule of professional conduct regarding professional responsibility issues related to the implementation of this act.

(b) The task force should consider the following issues:
(1) Whether an attorney must inform a client or a prospective client about the attorney's discretion to reveal the client's or prospective client's confidential information to the extent that the attorney reasonably believes that the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in the death of, or substantial bodily harm to, an individual.
(2) Whether an attorney must attempt to dissuade the client from committing the perceived criminal conduct prior to revealing the client's confidential information, and how those conflicts might be avoided or minimized.
(3) Whether conflict-of-interest issues between the attorney and client arise once the attorney elects to disclose the client's confidential information, and how those conflicts might be avoided or minimized.
(4) Other similar issues that are directly related to the disclosure of confidential information permitted by this act.
(c) Members of the task force shall include the following:
(1) Civil and criminal law practitioners, including criminal defense practitioners.
(2) Representatives from the judicial, executive, and legislative branches.
(3) Representatives from the State Bar Commission for the Revision of the Rules of Professional Conduct and from the State Bar Committee on Professional Responsibility and Conduct.
(4) Public members.

SEC. 4. The provisions of this act shall become operative on July 1, 2004.

Cal. Rule 2-100. Communication With a Represented Party

(A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.

(B) For purposes of this rule, a "party" includes:

(1) An officer, director, or managing agent of a corporation or association, and a partner or managing agent of a partnership; or

(2) An association member or an employee of an association, corporation, or partnership, if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

(C) This rule shall not prohibit:

(1) Communications with a public officer, board, committee, or body; or

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[1/] Please note that the proposed amendment that would add subparagraph (2) to § 6068(e), as well as the text added to Evidence Code in Section 2 of the bill, below, were originally made to the bill when it was amended in the Assembly on April 10, 2003. We have added the changes to this version of the bill so the reader can appreciate all the contemplated changes in a single version.

[2/] See footnote 1, above.

(2) Communications initiated by a party seeking advice or representation from an independent lawyer of the party's choice; or

(3) Communications otherwise authorized by law.

Discussion:

Rule 2-100 is intended to control communications between a member and persons the member knows to be represented by counsel unless a statutory scheme or case law will override the rule. There are a number of express statutory schemes which authorize communications between a member and person who would otherwise be subject to this rule. These statutes protect a variety of other rights such as the right of employees to organize and to engage in collective bargaining, employee health and safety, or equal employment opportunity. Other applicable law also includes the authority of government prosecutors and investigators to conduct criminal investigations, as limited by the relevant decisional law.

Rule 2-100 is not intended to prevent the parties themselves from communicating with respect to the subject matter of the representation, and nothing in the rule prevents a member from advising the client that such communication can be made. Moreover, the rule does not prohibit a member who is also a party to a legal matter from directly or indirectly communicating on his or her own behalf with a represented party. Such a member has independent rights as a party which should not be abrogated because of his or her professional status. To prevent any possible abuse in such situations, the counsel for the opposing party may advise that party (1) about the risks and benefits of communications with a lawyer-party, and (2) not to accept or engage in communications with the lawyer-party.

Rule 2-100 also addresses the situation in which member A is contacted by an opposing party who is represented and, because of dissatisfaction with that party's counsel, seeks A's independent advice. Since A is employed by the opposition, the member cannot give independent advice.

As used in paragraph (A), "the subject of the representation," "matter," and "party" are not limited to a litigation context.

Paragraph (B) is intended to apply only to persons employed at the time of the communication. (See Triple A Machine Shop, Inc. v. State of California (1989) 213 Cal.App.3d 131 [261 Cal.Rptr. 493].)

Subparagraph (C)(2) is intended to permit a member to communicate with a party seeking to hire new counsel or to obtain a second opinion. A member contacted by such a party continues to be bound by other Rules of Professional Conduct. (See, e.g., rules 1-400 and 3-310.) (Amended by order of Supreme Court, operative September 14, 1992.)

Rule 2-200. Financial Arrangements Among Lawyers

(A) A member shall not divide a fee for legal services with a lawyer who is not a partner of, associate of, or shareholder with the member unless:

(1) The client has consented in writing thereto after a full disclosure has been made in writing that a division of fees will be made and the terms of such division; and

(2) The total fee charged by all lawyers is not increased solely by reason of the provision for division of fees and is not unconscionable as that term is defined in rule 4-200.

(B) Except as permitted in paragraph (A) of this rule or rule 2-300, a member shall not compensate, give, or promise anything of value to any lawyer for the purpose of recommending or securing employment of the member or the member's law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's law firm by a client. A member's offering of or giving a gift or gratuity to any lawyer who has made a recommendation resulting in the employment of the member or the member's law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.

Rule 3-110. Failing to Act Competently.

(A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

(B) For purposes of this rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.

(C) If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting

another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.

Discussion:

The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents. (See, e.g., Waysman v. State Bar (1986) 41 Cal.3d 452; Trousil v. State Bar (1985) 38 Cal.3d 337, 342 [211 Cal.Rptr. 525]; Palomo v. State Bar (1984) 36 Cal.3d 785 [205 Cal.Rptr. 834]; Crane v. State Bar (1981) 30 Cal.3d 117, 122; Black v. State Bar (1972) 7 Cal.3d 676, 692 [103 Cal.Rptr. 288; 499 P.2d 968]; Vaughn v. State Bar (1972) 6 Cal.3d 847, 857-858 [100 Cal.Rptr. 713; 494 P.2d 1257]; Moore v. State Bar (1964) 62 Cal.2d 74, 81 [41 Cal.Rptr. 161; 396 P.2d 577].)

In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily

Rule 3-210. Advising the Violation of Law

A member shall not advise the violation of any law, rule, or ruling of a tribunal unless the member believes in good faith that such law, rule, or ruling is invalid. A member may take appropriate steps in good faith to test the validity of any law, rule, or ruling of a tribunal.

Discussion:

Rule 3-210 is intended to apply not only to the prospective conduct of a client but also to the interaction between the member and client and to the specific legal service sought by the client from the member. An example of the former is the handling of physical evidence of a crime in the possession of the client and offered to the member. (See People v. Meredith (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612].) An example of the latter is a request that the member negotiate the return of stolen property in exchange for the owner's agreement not to report the theft to the police or prosecutorial authorities. (See People v. Pic'l (1982) 31 Cal.3d 731 [183 Cal.Rptr. 685].)

Rule 3-300. Avoiding Interests Adverse to a Client

A member shall not enter into a business transaction with a client; or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied:

(A) The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client; and

(B) The client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and

(C) The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition.

Discussion:

Rule 3-300 is not intended to apply to the agreement by which the member is retained by the client, unless the agreement confers on the member an ownership, possessory, security, or other pecuniary interest adverse to the client. Such an agreement is governed, in part, by rule 4-200.

Rule 3-300 is not intended to apply where the member and client each make an investment on terms offered to the general public or a significant portion thereof. For example, rule 3-300 is not intended to apply where A, a member, invests in a limited partnership syndicated by a third party. B, A's client, makes the same investment. Although A and B are each investing in the same business, A did not enter into the transaction "with" B for the purposes of the rule.

Rule 3-300 is intended to apply where the member wishes to obtain an interest in client's property in order to secure the amount of the member's past due or future fees. (Amended by order of Supreme Court, operative September 14, 1992.)